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In The

Supreme Court of the United States

October Term, 1984

—o—

CAROL DUNCAN, d/b/a TV NEWS CLIPS,

Petitioner,

vs.

SOUTHERN AND PACIFIC COMPANY, INC., d/b/a WXIA-TV,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Does the First Amendment's free speech clause prevent a television station from using the copyright law to deny reasonable public access to its previously aired television newscasts?

2. Does the fair use doctrine protect the public's right of reasonable access to copyrighted news reports broadcast over the public airwaves?

3. Does the Court of Appeals' decision violate the Copyright Statute in providing perpetual copyright protection for future works which are to be destroyed shortly after they are created?

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Petitioner Carol Duncan, d/b/a TV News Clips, ("Mrs. Duncan") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") entered in the above-entitled case on October 26, 1984.

OPINIONS BELOW

The Opinion of the Court of Appeals rendered October 26, 1984, is reported at 744 F.2d 1490 (11th Cir. 1984)—Appendix A hereto (cited herein as "App. A1 *et seq.*"). The Opinion of the United States District Court for the Northern District of Georgia entered October 13, 1983, is reported at 572 F. Supp. 1186 (N.D. Ga. 1983)—Appendix B hereto (cited herein as "App. A19 *et seq.*").

JURISDICTION

The Judgment of the Court of Appeals was entered on October 26, 1984. A Petition for Rehearing and a Suggestion for Rehearing in Banc was timely filed on November 14, 1984. The Petition for Rehearing was denied by order dated December 7, 1984—Appendix C hereto (App. A43). This Petition for Writ of Certiorari has been timely filed within ninety days thereafter. The jurisdiction of this Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment and Article I, § 8, cl. 8 (Copyright Clause) of the United States Con-

stitution and section 107 of the Copyright Act of 1976, 17 U.S.C. § 107, each of which is printed in full in Appendix D hereto (App. A45 *et seq.*).

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STATEMENT OF THE CASE

This is an action for alleged infringement of statutory copyright. Jurisdiction of the district court was invoked under 28 U.S.C. § 1338(a).

Petitioner, Mrs. Carol Duncan, d/b/a TV News Clips (Mrs. Duncan) is a broadcast monitor in the Atlanta area. She tapes newscasts off-the-air and provides hard copies, known as videoclips, of news stories appearing on the newscasts. These videoclips are usually provided to the subjects of the news stories.[1] Mrs. Duncan monitors news broadcast by Respondent, Pacific and Southern Company, Inc., d/b/a WXIA-TV (WXIA), an affiliate of the National Broadcasting Company, and other Atlanta television stations. She limits her service to newscasts and does not monitor entertainment or sports programming. She does

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[1] Mrs. Duncan's clients include lawyers, public officials (Governor Harris of Georgia; Secretary of Transportation Elizabeth Dole); trade associations (National Association of Educators; Georgia Association of Educators); governmental agencies (Environmental Protection Agency; Internal Revenue Service; General Services Administration); newspapers (Atlanta *Journal* and Atlanta *Constitution);* television networks (Cable News Network); political groups (Georgia Republican Party; National Republican Committee); colleges and universities (Emory University; Morehouse College of Medicine); hospitals (Northside Hospital; DeKalb General Hospital; Piedmont Hospital; Grady Hospital); public utilities (Georgia Power); and numerous businesses of various kinds.

not sell videotapes of the newscasts, only videoclips of stories appearing as a part of the newscasts.

A. The Broadcast Monitoring Industry.

A broadcast monitoring service is to the electronic media what a newspaper clipping service is to the print media. Both provide clips, or clippings, of news stories reported by the media to viewers or readers. The services of broadcast monitors and newspaper clipping concerns are such that a particular television station or newspaper could not perform them even if so inclined. A television station or newspaper can provide a record only of the news it carries. Neither can monitor or review the news reported by its competitors.

This case is unique in that a television station objects to a monitoring service for television viewers of the same type that has been provided for decades to newspaper readers. There is not a single reported case brought by a newspaper publisher against a newspaper clipping service for copyright infringement based upon a claim that the copyright laws prohibit news clipping agencies.

A new and growing industry, broadcast monitoring developed because of the nature of television newscasts. Every commercial television station in this country, each of which is licensed by the Federal Communications Commission, broadcasts news several times a day. The public pays them for their efforts by the purchase of goods advertised on the newscasts.

Television newscasts are fast paced, short-lived presentations. They contain many news stories during a thirty, sixty, or ninety minute period. Often competing stations present newscasts in the same city at the same time.

The stories on the newscasts are brief and presented between frequent commercial breaks. Given these facts, a viewer interested in a particular story carried by three stations in a city will see the story he is interested in on all three channels only by chance. Yet, the contents of the story about the same subject may vary substantially from channel to channel.

Local television newscasters do not limit their news to local stories. Television stations often report news stories, for example, about national companies such as General Motors, IBM, Exxon or Proctor and Gamble. These companies have a business purpose in knowing what is reported about them nationwide in different locales. For them, as well as for many subjects of the news stories, a broadcast monitor is a significant source of information which is frequently unavailable elsewhere, even from the broadcaster of the report.

The success of broadcast monitoring services is proof that they provide a service to the public by fulfilling a need. Businesses have a legitimate concern for their image as presented by the media. Public officials need to know what is being reported over the airwaves about a particular event. Attorneys sometimes require records of television coverage of an accused client in support, for example, of a motion for change of venue. Indeed, the ephemeral nature of television newscasts means that the services of a broadcast monitor are useful whenever a record of publicly aired information is needed. But the full potential of the industry has not been realized because it is new and still developing.

The decision below will seriously erode, if not destroy, the industry.[2] Less than two months after the Court of Appeals rendered its decision, WXIA's attorney sent a cease and desist letter to a broadcast monitor in New York City which was monitoring WXIA newscasts and enclosed a copy of the decision.[3] In view of the Copyright Act's sanctions for "willful infringement," 17 U.S.C. § 504 (c) (2), and criminal sanctions, *id.*, § 506, such a letter with a copy of the opinion will serve to shut down one monitor, then another, and finally to stamp out a new industry.

The importance of broadcast monitoring derives in part from the fact that the function of a newscaster is inherently different from that of the creative artist. The newscaster's only role is to convey to the public information about community, state and national affairs. Newscasters also convey to the public what would otherwise be private information about individuals and various entities, regardless of the desires or wishes of the subjects of the stories. The right of the newscaster to do so is clear under the First Amendment. The right of those individuals and entities to have reasonable access to those reports about them after they have been broadcast should be made equally clear. A broadcast monitor complements, but does

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2 Litigation against a broadcast monitor similar to this case is presently pending in Texas. *Community Television Foundation of South Florida, Inc. d/b/a WPBT-TV Channel 2 v. Jack Cato and Shirley Cato, d/b/a Broadcast News Reports,* Civil No. H-83-5742, U.S.D.C., S.D. Tex., Houston Div.

3 The letter is reprinted as Appendix E, A47. The public significance of this case is shown by the fact that CBS, Inc. filed an extensive amicus memorandum in the District Court and an amicus brief in the Court of Appeals.

not compete with, the television newscaster in providing a public service.

B. WXIA's Retention and Marketing Policy.

WXIA, like most local newscasters, retains videotapes of its newscasts for only one week. (App. A37) In accordance with the apparent custom of the industry, it reuses the videotape on which a newscast is recorded every seventh day. The videotape used to record a Monday's newscasts, for example, is reused to record the next Monday's newscasts. The newscasts of the previous Monday are erased as the more recent newscasts are recorded over them. WXIA does retain "partial visual elements the program" (App. A37) for its library, as well as the scripts and an audiotape of the newscast. (App. A2)

WXIA does not actively market videoclips from its newscasts, (App. A2) "and admits that it has no real concern that it ever sell any tapes." (App. A41) It does sell videoclips to persons who request them "as a public service" (App. A21-22) but only at its discretion. For example, as the Court of Appeals noted, WXIA refuses to sell tapes to candidates for public office "because the sale could appear to be an endorsement or other show of support for the candidate. Out of a similar concern over favortism, the station asks for a subpoena before selling a tape that will be used in litigation." (App. A2 n.1)

Relying on the 1976 Copyright Act provision permitting copyright protection for live broadcasts if simultaneously recorded, 17 U.S.C. § 101 (definition of "fixed") and 102, WXIA claims copyright protection for its newscasts. But it does not undergo the effort and expense of register-

ing its claim of copyright on those newscasts with the Copyright Office.[4]

C. History of This Lawsuit.

On March 11, 1981, WXIA broadcast a short news story about Floyd Junior College. The total story, the subject of which was a physical fitness trail the college had installed, lasted less then two minutes (App. A21) on a ninety minute newscast. Mrs. Duncan sold a videoclip of that story to the public relations director of the college who purchased it at the request of WXIA. (Tr. Trans. 62) The fee was $55.00. (App. A42)

In May, 1981, in preparation for this litigation, WXIA, for the first time ever, sought to register the copyright of one of its newscasts, the newscast of March 11, 1981.[5] The videotape of the newscast, however, was no longer in existence. Presumably in accordance with its custom, WXIA had erased the videotape. (App. A37) Ironically, WXIA used the alleged infringing videoclip made by Mrs. Duncan which it had obtained from Floyd Junior College (App. A11 n.9) and an audiotape of the newscast for registra-

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[4] The copyright of a work must be registered in order for the owner to bring an action for its infringement. 17 U.S.C. § 411(a). But a live television newscast cannot be registered as such since only works fixed in a tangible medium of expression are copyrightable. 17 U.S.C. § 102. It is the videotape of the newscast that is copyrighted, 17 U.S.C. § 101 (definition of "fixed"), and special provision is made for the registration of videotapes of live television broadcasts. 17 U.S.C. § 411(b).

[5] At the time of trial, a year and over 1,000 newscasts after the March 11, 1981 newscast, WXIA had not registered a claim of copyright on any other of its newscasts.

tion.[6] The Copyright Office, of course, could not register the non-existent videotape of the newscast, but did register the videoclip and the audiotape. The Copyright Office had no way of knowing that the videoclip deposited with it was made by Mrs. Duncan and not fixed "by or under the authority of the author," 17 U.S.C. § 101 (definition of "fixed").

In June, 1981, WXIA filed this lawsuit for copyright infringement seeking $50,000 in statutory damages and a permanent injunction to prevent Mrs. Duncan from monitoring its newscasts. WXIA admitted that Mrs. Duncan's use of its newscasts does not harm it financially in any way, (Tr. Trans. 84) that Mrs. Duncan was not in competition with it, (Tr. Trans. 86) and that yesterday's newscast has no economic value for it. (Tr. Trans. 87)

The District Court denied Mrs. Duncan's fair use defense without applying the four statutory factors of section 107 because "17 U.S.C. §107 does not automatically require any use which is sought to be labelled 'fair' to be analyzed under the guidelines set forth in subparagraph (1) through (4). Rather, it is only where the use is clearly for 'purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,' . . . that the Court's interest in subfactors (1) through (4) is triggered." (App. A32-33) The court held Mrs. Duncan's use of WXIA's newscasts to be an infringement, denied WXIA a permanent injunction because of "First Amendment considerations," found the

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[6] WXIA retained a copy of the "Fitness Trail" story, but that copy did not contain the introduction to the story by the anchor persons on the newscast as did the clip made by Mrs. Duncan.

actual damages to be "trivial" and awarded WXIA $35.00.

The Court of Appeals rejected the District Court's interpretation of 17 U.S.C. § 107. It applied the four statutory factors relating to fair use and relied most heavily on the fact that Mrs. Duncan's use was a commercial use. The Court of Appeals affirmed the District Court's denial of Mrs. Duncan's defense of fair use and finding of infringement, reversed as to the denial of a permanent injunction, and remanded the case for the entry of the injunction. WXIA did not contest the award of damages on appeal.

REASONS FOR GRANTING THE WRIT

I. This Court Should Determine Whether the First Amendment's Free Speech Clause Prevents a Television Station from Using the Copyright Law to Deny Reasonable Public Access to Its Previously Aired Television Newscasts.

A. The Importance of the Question.

The core question in this case involves the interrelationship of free speech and copyright as applied to television newscasts: Can copyright law be used to override the First Amendment right of reasonable public access to news reports broadcast over the public airwaves?

This issue is in itself an "important question of federal law which has not been, but should be, settled by this court." Moreover, the Court of Appeals' opinion raises two related issues of major importance in the adminis-

tration of the copyright law. The first is whether the fair use doctrine protects the public's right of reasonable access to copyrighted news reports after they have been broadcast over the public airwaves. The second is whether the Court of Appeals violated the copyright statute in providing perpetual copyright protection for future works to be destroyed shortly after they are created. These are "questions whose resolution will have immediate importance far beyond the particular facts and the parties involved. . . ."[7]

B. The Free Speech Issue.

For the first time in the history of copyright, a federal court has used the copyright statute to order a permanent injunction that denies reasonable public access to news reports. This is a manifest denial of the "right to receive information and ideas," under the First Amendment. *Board of Education v. Pico*, 457 U.S. 853, 867 (1982). *Cf. Stanley v. Georgia*, 394 U.S. 557, 564 (1969)

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[7] This case also presents an issue in regard to the electronic media similar to that which *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195 (2d Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984), presents in regard to the print media. Both cases involve the application of the fair use doctrine to news reported by the media. *Harper & Row* involves the print media, while this case involves the electronic media. But *Harper & Row*, finding the use to be a fair use, is contrary to the Court of Appeals' decision in this case. If this Court should affirm *Harper & Row*, the Eleventh Circuit's opinion would stand contrary to a decision of this Court; if this Court should reverse *Harper & Row*, there would be confusion as to the applicability of the fair use doctrine to news reported by the electronic media. The copyright owner in *Harper & Row* intended to provide more than reasonable access to the material; in this case, the copyright owner seeks to inhibit public access to the copyrighted material.

("It is now well established that the Constitution protects the right to receive information and ideas.")

The First Amendment protects the media's right to report what it wishes, when it wishes, where it wishes without regard to taste, decorum or respect for privacy. The First Amendment even protects the press from being compelled to correct a wrong report. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). The First Amendment, one can assume, also protects the right of the electronic media to destroy a record of what it has reported.

The First Amendment should also protect the public's right of access to that which the media reports. For the First Amendment protection for the media "derives, not from any special status of members of the press as such, but rather '[i]n seeking out the news the press . . . acts as an agent of the public at large,' . . ." *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 397-98 (1979) (Powell, J. concurring).

There are any number of reasons why a citizen or a group of citizens may wish to have newscasts monitored, for example, prejudicial reporting as to minorities, *see, e.g. Office of Communication of the United Church of Christ v. Federal Communications Commission,* 425 F.2d 543 (D.C. Cir. 1969), or for purposes of researching media treatment of a particular issue. But given the fact that news is "the history of the day", the First Amendment protects the right of a citizen to use the services of a broadcast monitor regardless of the reason.

C. The Copyright Issue.

When, as in this case, copyright law is applied to a new medium of communication, the issue of the proper

administration of that law arises anew. For as the electronic media involves an "unusual order for first amendment values," *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94, 101 (1973), it also involves an unusual order of copyright values.

WXIA has not yet answered the basic question in this case: What copyright values is it seeking to protect in denying public access to its previously aired newscasts, the videotapes of which it erases.[8] The question is of particular importance because it involves the issue of copyright protection for ephemeral reports of news only temporarily available to the public.

Certain fundamental principles control the application of copyright law. The constitutional purpose of copyright is to promote learning, U. S. Const., Art. I, § 8, cl. 8; copyright is the grant of a limited statutory monopoly, *Wheaton v. Peters,* 33 U.S. (8 Pet.) 591 (1834); and copyright is primarily for the benefit of the public and only secondarily for the benefit of the copyright owner. *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 156 (1975).

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[8] At trial, WXIA testified that its concern was "to protect its image," and that Mrs. Duncan's tapes are of inferior quality. (Tr. Trans. 84-86) Mrs. Duncan argued below that since WXIA regularly erases the videotapes of its newscasts, it is destroying evidence of defamation that it may perchance commit and preventing others from obtaining evidence of any such defamation. The Court of Appeals said, "An effort to discourage defamation suits might be an abuse of the copyright laws and a violation of the First Amendment, but that possibility is entirely imaginary in this case." (App. A-13-14) But of course the application of the rule of this case will not be limited to this case. Even if WXIA's purpose is not to discourage defamation actions, that is clearly the significant effect of its use of copyright in this case as no financial considerations are involved.

The Court of Appeals' decision is contrary to each of these fundamental propositions, for it holds that the fact that television newscasters regularly destroy the video tapes of their newscasts does not affect their right to plenary copyright protection.

The opinion thus treats copyright as an absolute, not a limited, monopoly. The injunction the court ordered provides perpetual copyright protection like the common law copyright Congress abolished. 17 U.S.C. § 301. Since Congress can grant copyright only for "limited times", U.S. Const., Art. I, § 8, cl. 8, "A federal copyright statute which purported to grant copyright protection in perpetuity would clearly be unconstitutional." Nimmer, *Copyright*, § 1.05[A], p. 1-34 (1984).[9]

D. The Interrelationship of Free Speech and Copyright.

The fact that the subject matter of the copyright here involved is news brings into issue the interrelationship of the free speech clause of the First Amendment and the copyright clause. As the District Court said, "Courts and commentators have for years recognized a possible tension between copyright and first amendment freedom of speech." (App. A27) While perhaps true in some cases,

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[9] As Professor Nimmer's comment implies, the vice is in the fact that the copyright protection is perpetual. Thus, an injunction based on the copyright statute that gives protection for a series of works as long as they exist, although each of the works has only a seven-day existence, can properly be characterized as perpetual. The purpose of denying perpetual copyright is to ensure that copyrighted works will eventually go into the public domain, a purpose that can never be realized as to WXIA's newscasts since WXIA erases the videotapes of its newscasts.

there is no such tension in this case; here the two constitutional provisions can be, and should be, complementary.

The copyright clause and the free speech clause both deal with the same subject, communication of ideas; both reflect the same values, protection of the expression of ideas; and both promote the same policy, the free flow of information. The copyright clause thus incorporates First Amendment values.

The means by which First Amendment values are incorporated into the copyright clause is the fair use doctrine. As one copyright scholar has stated:

> "The purpose of the fair use doctrine is to strike a balance between the First Amendment and the Copyright Act. The First Amendment protects the public's right to the free flow of ideas and information; the Copyright Act protects the copyright owner's right to the exclusive use and control of the work. The fair use doctrine strikes that balance by preventing a rigid application of the Copyright Act that would unreasonably interfere with or prevent the public dissemination of ideas and information." N. Boorstyn, *ed., The Copyright Law Journal, Special Focus Issue,* "The Doctrine of Fair Use," 2 (1984).

The application of the fair use doctrine to printed material and to television newscasts, however, involves different considerations. Unlike printed material, which is published and disseminated in permanent form, television broadcasts, including newscasts, are not published, they are performed. 17 U.S.C. § 101 (definition of "perform" and "publication"). The profit for the television newscaster comes not from the sale of copies of the work, but from advertisers. Thus, if the same copyright protection logically applied to printed materials such as books is in-

discriminately applied to television newscasts, the newscaster can use copyright law to inhibit rather than promote the flow of information.

That is precisely what WXIA is seeking to do in this case. The free speech clause should prevent a television station from using copyright to deny reasonable public access to its previously aired newscasts. The fair use doctrine correctly applied as required by First Amendment principles should protect the public's right of access to previously aired copyright newscasts.

These issues present substantial questions of law. The importance of the questions is such that they merit this Court's consideration.

II. This Court Should Determine Whether the Fair Use Doctrine Protects the Public's Right of Reasonable Access to Copyrighted News Reports Broadcast Over the Public Airwaves.

The Court of Appeals' opinion relied most heavily on the fact that Mrs. Duncan's use of the newscasts is a commercial use. This reliance is inconsistent with this Court's statement that a use "that has no demonstrable effect upon the potential market for, or value of, a copyrighted work need not be prohibited in order to protect the author's incentive to create." *Sony Corporation of America v. Universal City Studios, Inc.*, — U.S. —, 104 S. Ct. 774, 793 (1984). The Court of Appeals virtually ignored the fact that Mrs. Duncan's use of the newscasts does not affect the value of, or WXIA's market for, its newscast—the viewing audience.

As in *Sony,* Mrs. Duncan's use of the television newscasts does not create "a disincentive to produce that more than offsets the benefit inherent in allowing more viewers to see the programs." *The Supreme Court, 1983 Term,* 98 Harv. L. Rev. 87, 293 (1984). Yet, the Court of Appeals, by emphasizing Mrs. Duncan's commercial use and substantially ignoring the lack of any financial harm to WXIA, contradicted Sony, and "established what amounts to a virtually per se rule that commercial motive destroys the defense of fair use." *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.,* 626 F.2d 1171, 1175 (5th Cir. 1980).

A ruling that commercial motive destroys the fair use defense turns the doctrine on its head. As discussed below, the fair use doctrine originated as, and remains, a fair "commercial" use doctrine: it presupposes a limitation on the copyright monopoly by reason of a commercial use by a competitor. When properly applied, the focus is necessarily on the limitation of the monopoly, not on the use itself.

The fair use doctrine is the most important limitation on the copyright monopoly. As previously discussed, its importance derives from the fact that its purpose is "to strike a balance between the First Amendment and the Copyright Act." But fair use cases are characterized by frequent reversals, close decisions, and sharp dissents. As noted by Justice Blackmun in *Sony,* it "has been called with some justification, 'the most troublesome in the whole law of copyright.'" *Sony Corporation of America v. Universal City Studios, Inc., supra,* 104 S. Ct. at 806 (Blackmun, J. dissenting). This troublesomeness derives from a failure of analysis, a point which merits discussion.

A. The Fair Use Doctrine Analyzed.

The use of a copyrighted work will necessarily be one of three kinds: an unfair use (an infringement), a fair use (not an infringement) or what can be characterized as a normal use, for example, the reading of a book (neither an infringement nor a non-infringement). *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975) ("[I]f an unlicensed use of a copyrighted work does not conflict with an 'exclusive' right conferred by the statute, it is no infringement of the holder's rights.")

To determine whether a use is either unfair or fair, one must begin with the fact that copyright consists of a series of rights to which a given work is subject. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393 (1968). ("The Copyright Act does not give a copyright holder control over all uses of his copyrighted work.") These are the "exclusive" rights of the copyright holder.

These exclusive rights are: to reproduce the work in copies, to prepare derivative works, to distribute copies, to perform and to display the copyrighted work. 17 U.S.C. § 106. Although designated as exclusive, these uses are subject to the limitations set forth in twelve sections of the Copyright Act, 17 U.S.C. §§ 107-118, the most notable of which is the fair use doctrine. *id.*, § 107.[10] Thus, to be characterized as an infringing or as a fair use, a use has to be of the kind reserved "exclusively" to the copy-

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[10] In the 1976 Copyright Act, Congress treated fair use as an "equitable rule of reason," H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976), and listed four non-exclusive factors for courts to use in determining whether a use is fair: (1) the nature of work, (2) the nature of the use, (3) the amount used and (4) the effect on the value of or market for the work. 17 U.S.C. § 107.

right owner. Otherwise, it cannot be an infringement and there is no need to characterize it as a fair use. Such a use is simply a normal use.

The fair use of a work "is not an infringement of copyright." 17 U.S.C. § 107. The fair use doctrine, then, is a limitation on the copyright monopoly. That monopoly, primarily economic in nature, is intended to serve the public interest. *Mazer v. Stein,* 347 U.S. 201, 219 (1954). If the public interest is to be properly served, the fair use doctrine is best viewed as a public right to limit a private economic monopoly. "The copyright law, . . . makes reward to the owner a secondary consideration." *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 158 (1948).

If one does not invade the economic monopoly of the copyright owner, the use is presumptively fair. *Sony Corporation of America v. Universal City Studios, supra.* In this case, however, we have the unusual situation of a use that does not invade the "economic" monopoly of the copyright owner, but which does provide economic benefits to the user. The question is whether the Court of Appeals improperly refused to characterize this use as a fair use.

B. The Origin of the Fair Use Doctrine.

The fair use doctrine originated in an 1841 case, *Folsome v. Marsh,* 9 F. Cas. 342 (C.C. D. Mass. 1841), a controversy between two publishers of biographies of George Washington. Justice Story held the defendant liable for infringement, but in doing so, he said:

> "The question, then, is whether this is a justifiable use of the original materials, such as the law

> recognizes as no infringement of the copyright of the plaintiffs. . . . In short, we must often, in deciding questions of this sort, look to the nature and object of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." 9 F. Cas. 341, 348.

This language created the fair use doctrine and, except for the nature of the work, encompasses the factors Congress used in providing guidelines for courts to use in determining whether a use is fair. 17 U.S.C. § 107. To grasp the full import of the language, it is necessary to view it in the context of the exclusive rights of the copyright owner in 1841. Those rights were "the sole right of printing, reprinting, publishing and vending" the copyrighted work. Copyright Revision Act of 1831, 4 Stat. 436. These rights were wholly commercial in nature and only a competitor would seek to exercise them. As originally established, the fair use doctrine was necessarily intended to enable a competitor to make a reasonable commercial use of a copyrighted work.

Eaton Drone in his 19th century classic on copyright law makes the point clear in his discussion of the fair use doctrine: "It is a recognized principle that every author, compiler or publisher may make certain uses of a copyrighted work, in the preparation of a rival or other publication." E. Drone, *A Treatise on the Law of Property in Intellectual Productions,* 386 (1879).

If a competitor's commercial use of a copyrighted work which presumably harms the value of or market for the work can be a fair use, *a fortiori* a non-competitor's

commercial use of such a work that does not harm the value of, or market for, the work should be a fair use.

C. The Cause of the Confusion.

The confusion about the fair use doctrine centers on the right to copy. Prior to the 1909 Act, the right to copy a copyrighted work was limited to works other than books, as statuary and works of fine art. *See* V. Clapp, *Copyright—A Librarian's View* (1968); Patterson, *Book Review,* 34 Van. L. Rev. 833, 836-38 (1981).

In the 1909 Copyright Act Congress gave to the copyright owner the exclusive right "to copy" all copyrighted works. 17 U.S.C. § 1 (1909 Act). There is, of course, a significant distinction between the exclusive right to copy a work of art—a painting or statue—and the exclusive right to copy a book. The normal use of a painting or statue does not involve copying the work, while the normal use of a book may well entail copying. For the first time, the 1909 Act gave the copyright owner an exclusive right (to copy a book) that an individual might wish to exercise in making a non-commercial, non-competitive use of the work.

Since the right to copy was now made an exclusive right of the copyright owner for all works, a strict construction of the language could mean that the individual's copying for personal uses only would be an infringement of copyright. Thus a leading copyright scholar writes, " . . . subject to the privilege of fair use, . . . copyright infringement occurs whenever an unauthorized copy . . . is made, even if it is used solely for the private purposes of the reproduced. . . ." Nimmer, *Copyright,* § 8.02[C],

pp. 8-26 (1984). See *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962). This proposition, directly contrary to the constitutional purpose of copyright—the promotion of learning—was clearly not the law prior to the 1909 Act. *Stover v. Lathrop*, 33 F. 348, 349 (C.C.D. Colo. 1888); *List Publishing Co. v. Keller*, 30 F. 772, 773 (C.C.S.D.N.Y. 1887). And even today, the better view is that a personal use is a fair use. *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) *aff'd by an equally divided court*, 420 U.S. 376 (1975).

The exclusive right of the copyright owner to copy all copyrighted works created confusion because the fair use doctrine could now be perceived as an invasion of the copyright owner's property rather than what it was in fact —a limitation on the statutory monopoly of copyright.[11] The change in perception meant a change from a strict construction of the monopoly of copyright to a strict construction of the doctrine of fair use. Thus, in this case,

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[11] Congress clearly did not intend to change the nature of copyright in the 1909 Act. Concerning the new language —the right "to print, reprint, publish, copy and vend"— the House Report stated: "Subsection (a) of § 1 adopts without change the phraseology of § 4952 of the Revised Statutes, and this, with the insertion of the word 'copy,' practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790." H. R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909).

Of this comment, it has been written: "Ironically, so far from 'retain[ing] without change' the old phraseology, the committees (the House of Representatives and the Senate shared the same report) were introducing a word that was new in the context. . . . Through it the copyright proprietors, without seeking it and apparently quite by accident, acquired at least the semblance of an activity that was to have increasing importance in the new century." V. Clapp, *Copyright—A Librarian's View* 27 (1968).

the Court of Appeals construed the fair use doctrine, not the copyright monopoly, strictly.

But the view that the fair use doctrine is an invasion of the copyright owner's property to be strictly construed requires the rejection of the teachings of this Court from *Wheaton v. Peters,* 33 U.S. (8 Pet.) 591 (1834) to *Sony Corporation of America v. Universal City Studios, supra,* as to the nature of copyright—that it is a limited statutory monopoly. And because "the fair use of a copyrighted work . . . is not an infringement of copyright," 17 U.S.C. § 107, this view is also contrary to the copyright statute.

D. The Policy Issue.

This case presents a fundamental policy issue of copyright law: Can copyright be used to prohibit reasonable pub'ic access to short-lived copyrighted works publicly disseminated for a brief period of time?

The issue is important because of the application of copyright to the electronic media. This Court provided an answer in *Sony,* but a slightly different factual situation led the Court of Appeals to a different result contrary to that case. The lower federal courts continue to need direction from this Court in the area of copyright law and the meaning of fair use. Given the fact that "the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of copyright and patent," *Sony Corporation of America v. Universal City Studios, supra,* at 104 S. Ct. 784 n.3, the danger is that lower courts will do what the Court of Appeals did in this case: create an anti-copyright, one that is used to inhibit rather than to promote learning, as the Constitution commands.

The policy issue here is a complex and difficult one which merits a full hearing by this Court. How it is resolved will determine whether the fair use doctrine can continue to maintain the copyright monopoly within reasonable bounds as it is extended to subject matter beyond the paradigm for which it was created.[12]

The implications of the Court of Appeals' decision are critical for the future development of copyright law. When the fair use doctrine is properly analyzed and applied, it is clear that it protects Mrs. Duncan's use of WXIA's television newscasts. To say otherwise is to create further confusion about the fair use doctrine and to distort the purpose of copyright. This case is one that requires this Court's consideration now in the interest of sound administration of the law of copyright.

III. This Court Should Determine Whether the Court of Appeals' Decision Violates the Copyright Act by Providing Perpetual Copyright Protection for Future Works Which are to be Destroyed Shortly After They Are Created.

The Court of Appeals' decision holds that the registration of an alleged infringing copy of a portion of a work

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[12] It is significant that Congress in the 1976 Copyright Act made a major change in the law of copyright. Until that Act, every copyright statute in this country, see *Copyright Laws of the United States of America, 1783-1962* (Copyright Office 1962), with one minor exception, 17 U.S.C. § 12 (1909 Act), required publication of the work as a condition for obtaining a statutory copyright. Section 12 provided copyright for certain kinds of unpublished works not reproduced for sale, *i.e.*, lectures, dramatic or musical compositions and photographs, works of art, plastic works or drawings. The 1976 Act provides copyright protection from the moment of fixation, 17 U.S.C. § 102, and thus no longer ensures public access to the copyrighted work by requiring publication.

which the copyright owner has intentionally destroyed entitles that owner to a permanent injunction providing copyright protection for similar works which it has not yet created and which it will systematically destroy on a seven day cycle after they are created. As discussed above, the decision creates a federal common law copyright which, like the state common law copyright Congress abolished, 17 U.S.C. § 301, provides copyright protection in perpetuity. *See* n.9, *supra*.

The Court of Appeals, treating copyright as an absolute monopoly, ignored both constitutional and statutory principles. First, the opinion ignores the fact that the Constitution empowers only Congress to provide for copyright and only for limited times. U.S.Const., Art. 1, § 8, cl. 8. The limitation, of course, is in furtherance of the promotion of learning, for it means that at the expiration of the copyright term, the work shall go into the public domain. Yet, in this case, the copyrighted works are destoyed within seven days of creation. There is no copy of the videotape of the newscast in issue, that of March 11, 1981, in existence, not even a registration copy.

Second, the statute requires registration of a claim of copyright as a condition of judicial relief. 17 U.S.C. § 411. "Under the bill, as under the law now in effect, a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his right in the courts until he has made registration." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 157. The videotaped portion of the newscast that was registered was not even fixed "by

or under the authority of the author" as the statute requires. 17 U.S.C. § 101 (definition of "fixed")

A permanent injunction to restrain the copying of future live television newscasts would relieve WXIA of the duty of complying with any of the requirements of the statute. It would not have to register its claim of copyright for judicial relief as required by statute, 17 U.S.C. § 411, and, not having to register its claim of copyright, it would not even have to fix the work in a tangible medium of expression, as required by the statute. 17 U.S.C. § 102. The effect of a permanent injunction in this case would be to provide copyright protection for works that may not even be copyrightable.

WXIA has obviously determined that copyright registration is not worth the expense. Yet, because the Court of Appeals ignored the registration requirements of the statute, it unwittingly granted WXIA copyright protection in perpetuity for unregistered ephemeral works. The case rewards a class of copyright claimants with an absolute monopoly without exacting any benefit for society. The consequences of a decision which does so warrant this Court's immediate consideration.

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CONCLUSION

For each and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

LYMAN RAY PATTERSON

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Carol Duncan, d/b/a
TV News Clips

APPENDIX A

PACIFIC AND SOUTHERN COMPANY, INC., d/b/a WXIA-TV, Plaintiff-Appellee, Cross-Appellant,

v.

Carol DUNCAN, d/b/a TV News Clips, Defendant-Appellant, Cross-Appellee.

No. 83-8782.

United States Court of Appeals,
Eleventh Circuit.
Oct. 26, 1984.

Appeals from the United States District Court for the Northern District of Georgia.

Before FAY and JOHNSON, Circuit Judges and Young*, District Judge.

JOHNSON, Circuit Judge:

Pacific and Southern Company, the owner of a television station, charges that Carol Duncan, d/b/a TV News Clips, has infringed its copyright by videotaping its news broadcasts and selling the tapes to the subjects of the news reports. We hold that the appellant has violated the copyright laws because her activities do not constitute "fair use" of the material. We also conclude that the television station is entitled to a permanent injunction preventing the appellant from continuing to infringe its copyright. Accordingly, we affirm in part and reverse in part.

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* Honorable George C. Young, U.S. District Judge for the Middle District of Florida, sitting by designation.

1. Facts

Pacific and Southern Company does business as WXIA-TV, a television station in Atlanta, Georgia. It broadcasts four local news programs each day and places a notice of copyright at the end of each newscast. A program consists of self-contained news stories originating outside the studio and linked together by live commentary from the anchor persons, along with weather reports and shorter news reports originating from the studio itself. WXIA records the entire program on videotape and audiotape. It retains a written transcript of the program for a year and the audiotape for an indefinite period of time; it also maintains videotape copies of all the news stories taped before broadcast and stories originating live from a location outside the studio. The station erases the videotape of the entire program after seven days, a practice that destroys any record of the visual element of segments of the show broadcast live from within the studio.

WXIA does not currently market videotape copies of its news stories. Nevertheless, some people ask the station for a chance to view a tape at the station or to purchase a copy for personal use. WXIA has always honored requests to view tapes and usually allows persons to buy the tapes they want.[1] The revenue from tape sales is a small portion of WXIA's total profits.

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1. The tapes cost one hundred dollars. WXIA will not sell tapes to political candidates because the sale could appear to be an endorsement or other show of support for the candidate. Out of a similar concern over favoritism, the station asks for a subpoena before selling a tape that will be used in litigation.

Carol Duncan operates a business known as TV News Clips, a commercial enterprise belonging to a nationwide association of news clipping organizations.[2] TV News Clips videotapes television news programs, identifies the persons and organizations covered by the news reports, and tries to sell them copies of the relevant portion of the newscast.[3] It does not seek the permission of WXIA or any other broadcaster before selling the tapes, nor does it place a notice of copyright on the tapes. A label on each tape does say, however, that it is "for personal use only not for rebroadcast." TV News Clips erases all tapes after one month.

This case began when TV News Clips sold a copy of a news feature to Floyd Junior College, the subject of a story aired by WXIA on March 11, 1981. WXIA obtained the tape purchased by Floyd Junior College, registered its copyright,[4] and brought this action to obtain damages for the infringement of its copyright and an injunction preventing unauthorized copying and sales of its news program. The district court, 572 F.Supp. 1186, found that the news feature was protected by the copyright laws and that TV News Clips had not made "fair use" of the material. It rejected the fair use defense without reaching the four factors listed in 17 U.S.C.A. § 107 (1977) because TV News Clips had not met its threshold burden of showing that its activity served a purpose such as "criticism, comment,

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2. TV News Clips belongs to the International Association of Broadcast Monitors, an organization of 20 to 30 members. Ms. Duncan is a past president of the association.

3. The customers pay $65 for an initial purchase and $25 for subsequent purchases.

4. WXIA does not normally register the copyright for its news programs.

news reporting, teaching . . . scholarship, or research," categories listed in the preamble to Section 107. Yet despite finding that TV News Clips had clearly violated WXIA's copyright, the district court denied the request for an injunction for three reasons. First the sales did not seriously threaten WXIA's creativity, so an injunction would not significantly further the main objective of the copyright laws, fostering creativity. Second, the court feared that an injunction would threaten First Amendment values served by the increased public availability of the news made possible by TV News Clips. Finally, the court found that WXIA had abandoned its copyright on several portions of the newscasts; it declined to formulate a decree that would distinguish between the abandoned and unabandoned portions.

II. "Fair Use" Defense to Statutory Liability

The news feature broadcast by WXIA undoubtedly falls within the protection of the copyright laws. The editorial judgment used to present effectively the events covered by the broadcast made it an "original" work of authorship, *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 759 (1978), and the feature became "fixed" in a tangible medium when it was recorded at the time of transmission.[5] Thus, it met the requirements of 17 U.S.C.A. § 102 (1977). The fact that the infringing tape is the only exact copy of the transmission

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5. The feature in this case was prerecorded, but the final product broadcast by WXIA included a live introduction by the anchor person and graphics (stating the reporter's name and location) superimposed over the pretaped version.

still in existence does not nullify the copyright. The statute requires only that the original work be "fixed" for a period of "more than transitory duration," not for the entire term of the copyright. 17 U.S.C.A. §§ 101, 102 (1977).

A copyright grants to the owner several exclusive rights, including the right to reproduce the copyrighted work and to distribute copies to the public. The courts have, however, developed over the years the concept of "fair use" to describe some limited and useful forms of copying and distribution that are tolerated as exceptions to copyright protection.[6] The 1976 Copyright Act codified this judicial doctrine at 17 U.S.C.A. § 107 (1977) without significantly altering it. The statute divides into a "preamble" and a list of factors to consider during the search for fair use:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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6. TV News Clips analogizes itself to a newspaper clipping service or an archive, both of which qualify for an exemption apart from the fair use doctrine. The statute defines an archive with some precision, and TV News Clips does not match the description. 17 U.S.C.A. § 108 (1977). Likewise, it cannot be considered a newspaper clipping servive because it does not purchase the copy that it sells to its clients. 17 U.S.C.A. § 109 (1977).

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C.A. § 107 (1977).

TV News Clips argued in the district court that its use of the news broadcast was a fair use of the material because it served an important societal interest in full access to the news. The court rejected the fair use defense without considering the four statutory factors because TV News Clips did not copy and distribute the material for purposes such as the ones listed in the preamble. The district court reasoned that since TV News Clips' use was not "inherently productive or creative," like each of the preamble uses, analysis of the four factors was unnecessary.

We agree with TV News Clips that the district court should have considered the four factors set out in the statute. The statute uses mandatory language to the effect that in a fair use determination, the "factors to be considered *shall* include" (emphasis added) the four listed.[7]

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7. As a result, the House Committee on the Judiciary may have overstated its intention to leave the doctrine of fair use unchanged, because the statute clearly offers new guidance for courts considering fair use defenses. It establishes a minimum number of inquiries that a court must carry out, even if it leaves to the courts how to assign relative weights to each factor and how to supplement the first four factors. See House Report No. 94-1476. U.S. Code Cong. & Ad. News 1976, p. 5659.

The preamble merely illustrates the sorts of uses likely to qualify as fair uses under the four listed factors.

The approach taken by the district court impedes the ability of the fair use doctrine to function as a "rule of reason." Fair use allows a court to resolve tensions between the ends of copyright law, public enjoyment of creative works, and the means chosen under copyright law, the conferral of economic benefits upon creators or original works. Where strict enforcement of the rights of a copyright holder under 17 U.S.C.A. § 106 (1977) would conflict with the purpose of copyright law or with some other important societal value, courts should be free to fashion an appropriate fair use exemption. The district court fashioned a per se rule that a use must be inherently productive or creative before it can be a fair use, but a doctrine meant to resolve unforeseen conflicts of values should not turn on such a narrow inquiry. The Supreme Court, in its recent fair use decision in *Sony Corp. v. Universal City Studios,* — U.S. —, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984), did not conduct any preliminary tests before analyzing the four statutory factors. It expressly refused to look to productivity alone in determining what constituted a fair use. *Id.* at n. 40. Hence, the Supreme Court's recent application of the doctrine, as well as the traditional purpose of fair use, points out the error of the district court's reasoning.

Despite the district court's erroneous interpretation of the law, we need not remand this case for further fact-finding. The district court resolved all the issues of fact necessary for us to conclude as a matter of law that TV News Clips' activities do not qualify as a fair use of the copyrighted work. *See Triangle Publications, Inc. v.*

Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir.1980) (analyzing usage under the four statutory factors where district court had made findings under an erroneous view of controlling legal principles).[8]

The purpose and character of TV News Clips' use of WXIA's work heavily influences our decision in this case. TV News Clips copies and distributes the broadcast for unabashedly commercial reasons despite the fact that its customers buy the tapes for personal use. The district court characterized TV News Clips, as a "full-fledged commercial operation." 572 F.Supp. at 1189 n. 1. TV News Clips denies that its activities have a commercial purpose; instead, it says that its purpose is "private news reporting," meant to provide the public with a record of news reports. Of course, every commercial exchange of goods and services involves both the giving of the good or service and the taking of the purchase price. The fact that TV News Clips focuses on the giving rather than the taking cannot hide the fact that profit is its primary motive for making the exchange.

This commercial nature of the use militates quite strongly against a finding of fair use, for the Supreme Court emphasized in *Sony, supra,* that a commercial purpose makes copying onto a videotape cassette "presumptively unfair." 104 S.Ct. at 792. Even before the Su-

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8. Fair use is probably best characterized as a mixed question of law and fact that can be decided by an appellate court if the trial court has found facts sufficient to evaluate each of the four statutory factors. *Cf. Meeropol v. Nizer,* 560 F.2d 1061, 1070 (2d Cir. 1977) (trial court erroneously determined fair use as a matter of law before allowing case to go to jury because there were no factual findings regarding first or fourth statutory factors).

preme Court's decision, many federal courts had found the commercial nature of a use especially significant, if not determinative. *See MCA, Inc. v. Wilson,* 677 F.2d 180 (2d Cir.1981); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., supra,* at 1175-76; *Association of American Medical Colleges v. Mikaelian,* 571 F.Supp. 144, 153 (E.D.Pa.1983) (Commercial purpose is not determinative, but "a court should not strain to apply the fair use defense when it is being invoked by a profit-making defendant").

We also note that TV News Clips' use is neither productive nor creative in any way. It does not analyze the broadcast or improve it at all. Indeed, WXIA expressed concern over the technical inferiority of the tapes. TV News Clips only copies and sells. As the uses listed in the preamble to Section 107 indicate, fair uses are those that contribute in some way to the public welfare. Until recently a few courts had automatically considered unproductive or uncreative uses to be unfair. *Universal City Studios, Inc. v. Sony Corp. of America,* 659 F.2d 963 (9th Cir.1981), *rev'd,* — U.S. —, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984); *Rubin v. Boston Magazine Co.,* 645 F.2d 80 (1st Cir.1981); *Dow Jones & Co., Inc. v. Board of Trade,* 546 F.Supp. 113 (S.D.N.Y.1982). Although the Supreme Court has rejected "productive use" as an absolute prerequisite to a defense of fair use, it has recognized that the distinction between productive and unproductive uses could be "helpful in calibrating the balance." *Sony,* 104 S.Ct. 795, n. 40. The unproductive nature of TV News Clips' use affects the balance in this case.

The fourth fair use factor, the effect on the potential market for the work, is closely related to the first. By ex-

amining the effect of a use, a reviewing court can measure the success of the original purpose and single out those purposes that most directly threaten the incentive for creativity which the copyright tries to protect. Some commercial purposes, for example, might not threaten the incentives because the user profits from an activity that the owner could not possibly take advantage of. *See Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., supra.* But in this case, TV News Clips uses the broadcasts for a purpose that WXIA might use for its own benefit. The fact that WXIA does not actively market copies of the news programs does not matter, for Section 107 looks to the "potential market" in analyzing the effects of an alleged infringement. Copyrights protect owners who immediately market a work no more stringently than owners who delay before entering the market. TV News Clips sells a significant number of copies that WXIA could itself sell if it so desired; therefore, TV News Clips competes with WXIA in a potential market and thereby injures the television station. This evidence is reinforced by a presumption established in *Sony* that a commercial use naturally produces harmful effects. 104 S.Ct. at 793. The actual harmful effect, along with the presumption, undermines any fair use defense.

The third factor directs our attention to the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The Floyd Junior College story stands alone as a coherent narrative, and WXIA saves it as a distinct unit for future reference apart from the rest of the March 11 broadcast. The Register of Copyrights issued a certificate of copyright for the Floyd Junior College segment and for the entire broadcast. More-

over, the district court found that WXIA had properly registered the story and the whole broadcast.[9] We agree with the district court that the feature stands alone as a copyrighted work in this case.[10] Hence, TV News Clips copied an entire work. And even if the story could not stand independent of the entire newscast, we could not ignore that fact that TV News Clips tapes virtually all of the broadcast on a daily basis. By bringing a suit for injunctive relief as well as damages, WXIA is challenging the entire practice of copying and selling news stories, not just the sale of the Floyd Junior College story.[11] Because TV News Clips uses virtually all of a copyrighted work, the fair use defense drifts even further out of its reach. *See Marcus v. Rowley,* 695 F.2d 1171 (9th Cir.1983).

Finally, the second factor calls on us to analyze the nature of the copyrighted work. This is the only factor

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9. TV News Clips contends that the district court erred in its finding that WXIA had properly registered the Floyd Junior College story because WXIA had deposited, pursuant to 17 U.S.C.A. § 408(b) (1977), the copy made by News Clips. This invalidated the registration, it argues, because the copy was not fixed "under authority of the author." It is true that a work must be fixed under authority of the author in order for the protections of copyright to take effect. 17 U.S.C.A. § 101 (1977). But the tape that "fixes" a broadcast need not be the same tape that is deposited for registration.

10. This case differs from *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., supra,* where the court held that the cover of a magazine was not a copyrighted work apart from the whole magazine. There was no evidence in that case that the cover had been registered apart from the magazine or that they were stored or used separately.

11. In addition, we mention that a small portion of a work may be especially significant. The single story involving a particular subject is by far the most significant portion of the newscast for that potential customer.

that arguably works in favor of TV News Clips. The importance to society of the news could affect the definition of a fair use for a number of reasons.[12] But the courts should also take care not to discourage authors from addressing important topics for fear of losing their copyright protections. The necessarily limited impact of this second factor, along with the commercial and unproductive purpose of the use, the injury to the potential market, and the substantial amount of copying, leads us to conclude that TV News Clips has not made fair use of the protected work.

TV News Clips urges us to consider a fifth factor in evaluating its claim of fair use. It points to WXIA's status as a governmental licensee, with a duty "to provide public access to newscasts," and argues that the fair use doctrine should be employed here to prevent WXIA from using the copyright laws to restrict public access in violation of its duties as a government licensee. WXIA is cor-

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12. The Supreme Court has mentioned that use of a news program may give rise to a fair use defense more easily than use of a full-length motion picture. *Sony, supra,* 104 S.Ct. at 795, n.40. The Court does not fully explain this distinction, but the context suggests that the large secondary market for motion picture copies makes fair use less appropriate in that context. As discussion of the fourth factor revealed, significant commercial harm is present in this case. Another court found that the great public interest in the contents of a book (the memoirs of Gerald Ford) called for application of the fair use doctrine. *Harper & Row, Publishers, Inc. v. National Enterprises,* 723 F.2d 195 (2d Cir.1983). But the *Harper & Row* court also relied on other factors, particularly the fact that the alleged infringer used material from the book that was for the most part not copyrightable at all. Furthermore, the public interest in the average news story is far less than the interest in presidential memoirs.

rect in contending that its duties as a public trustee do not go as far as TV News Clips claims. The cases cited by the appellant, *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); and *Muir v. Alabama Educational Television Commission,* 656 F.2d 1012, 1017 (5th Cir.1981), *on rehearing,* 688 F.2d 1033, *cert. denied,* 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983), indicate, if only by implication, that broadcast licensees and the press generally have a duty to provide public service. That duty finds at least partial expression in the fair use doctrine. But it is a long way from this proposition to TV News Clips' position that a licensee violates the public trust by enforcing its copyright against persons other than members of the press. WXIA has chosen to produce a news program and allows anyone interested to view the program after its broadcast. Certainly it has fulfilled its public obligations by doing this much. Therefore, WXIA's status as a public trustee does not change our evaluation of the fair use claim.

III. Constitutional Limits on Statutory Liability

The appellant claims that even if its fair use defense fails, the First Amendment protects its activity. WXIA, when it enforces the copyright, allegedly violates the First Amendment in two different ways. First, it destroys and suppresses evidence of possible use in a defamation action against itself, and second, it denies the public its right of access to broadcast material. An effort to discourge defamation suits might be an abuse of the copyright laws and a

violation of the First Amendment, but that possibility is entirely imaginary in this case. As for the right of public access, we acknowledge that the public has a limited interest in "making television broadcasting more available." *Sony, supra,* 104 S.Ct. at 795. This public interest might be threatened if WXIA absolutely refused to allow the public to view recordings or scripts of its broadcasts. But as the Supreme Court made clear in *Sony,* the public interest in broadcast availability does not protect every activity that exposes more viewers to a broadcast. Furthermore, TV News Clips only increases access in a limited way by selling to a small group of customers, some of whom would buy a tape from WXIA anyway. Because the public already has access to this material and TV News Clips does not offer any access that WXIA could not provide, TV News Clips' activities fall well beyond whatever protections might be available to further this public access interest. The First Amendment does not conflict with WXIA's effort to enforce its copyright in this case.

Finally, TV News Clips argues that every copyright must further the ends of the Copyright Clause of the Constitution. WXIA's copyright, TV News Clips says, does not further those ends and should not be enforced, because WXIA systematically destroys its broadcast videotapes and deprives the public of the benefits of its creative efforts.[13] We agree that the Constitution allows Congress to

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13. This alleged conflict between the ends of copyright law and its application in a particular case should be analyzed under the fair use rubric. We will, however, defer to TV News Clips' desire to treat this as a separate defense just as we did with regard to its First Amendment arguments, for our conclusion would be the same under either approach.

create copyright laws only if they benefit society as a whole rather than authors alone. That is what the Congress has done.[14] But this does not mean that every copyright holder must offer benefits to society, for the copyright is an incentive rather than a command. And, *a fortiori*, a copyright holder need not provide the most complete public access possible. WXIA provides complete access for seven days and permanent access to everything except the visual images broadcast live from within the studio. The public benefits from this creative work; therefore, enforcing the copyright statute in this case does not violate the Copyright Clause.

IV. Remedy

WXIA has proven that TV News Clips infringed its copyright. The district court found that TV News Clips had regularly copied the newscast and sold the tapes, and would continue to do so.[15] Unless it can obtain an injunction, WXIA can only enforce its copyrights against TV News Clips by finding out which stories have been copied and sold, registering those stories, and bringing many dif-

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14. It has created a structure that encourages creativity and public enjoyment of that creativity by giving authors the exclusive rights to profit from their works in certain ways. Since authors most often profit by distributing their works to the public, society usually benefits. *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir.1979). Where the First Amendment removes obstacles to the free flow of ideas, copyright law adds positive incentives to encourage the flow.

15. Indeed, the court considered future sales by TV News Clips to be a virtual certainty and a "modest social benefit." 572 F.Supp. at 1196.

ferent infringement actions against TV News Clips. Each infringement action would yield a rather small damage recovery.[16] This is a classic case, then, of a past infringement and a substantial likelihood of future infringements which would normally entitle the copyright holder to a permanent injunction against the infringer pursuant to 17 U.S.C.A. § 502(a) (1977). *See Milene Music Inc. v. Gotauco,* 551 F.Supp. 1288 (D.R.I.1982); 3 *Nimmer on Copyright* § 13.05[B] (1983). The question is whether the district court abused its discretion in refusing to issue the injunction.[17] Because none of the three grounds relied upon by the court for denying injunctive relief are legally suffi-

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16. The award in this case was $35.

17. TV News Clips insists that WXIA is not legally entitled to an injunction, because it seeks an injunction against the infringement of works that have not been created (future newscasts) rather than an injunction applicable only to the March 11 program. The statute itself does not impose such a requirement, for it empowers district courts to issue injunctions "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C.A. § 502(a) (1977). The appellant bases its argument on the requirement that an author register a work before instituting an infringement action. 17 U.S.C.A. § 411 (1977). An injunction against the use of unregistered works would bypass this requirement.

    The district court in this case had the power to issue such an injunction because the statute provides for injunctions to prevent infringement of "a copyright" (emphasis added), not necessarily the registered copyright that gave rise to the infringement action. The opposite result would be especially unjust in a case such as this one in which the registered work and the future works are so closely related, part of a series of original works created with predictable regularity and similar format and function. To refuse injunctive relief under these conditions would render meaningless the fact that registration is "not a condition of copyright protection." 17 U.S.C.A. § 408(a) (1977).

cient to support the decision, we hold that the court did abuse its discretion.

The court began its discussion by noting that an injunction would not greatly further the ends of the copyright laws, because the post-broadcast market is relatively unimportant to WXIA as a creative incentive. We agree but find that fact standing alone to be irrelevant. The disincentive to creativity caused by the infringement would be just as small if WXIA were to wait and bring infringement actions in the future. The weakness of WXIA's interest in stopping this infringement has no bearing on the choice between present injunctive relief and future damage relief unless some independent consideration weighs against the use of an injunction in this case.

The "modest" furtherance of First Amendment rights accomplished by TV News Clips, the second ground relied upon by the court, does not provide any such independent reason to disfavor an injunction. It is undoubtedly true that TV News Clips (like any copyright infringer) increases public access to the copyrighted work. But the First Amendment issue of public access was duly considered when resolving the liability issue. If the First Amendment would not prevent WXIA from recovering for individual infringements in the future, it should not bar an injunction in the present. The scope of liability affects First Amendment interests, but the choice of the form of relief in this case does not.

Finally, the district court found injunctive relief inappropriate because WXIA regularly abandons the copyright on a portion of its program when it erases the videotape of the entire broadcast. Certainly the erasure shows that

WXIA did not desire to distribute post-broadcast copies of parts of the program. Failure to distribute a work does not mean, however, that an owner intends to allow others to use the work, and it is questionable whether WXIA had such an intent. Destroying the only known copy of a work would seem to be the best way to assure that it will not be used by another. Still, we do not say that destruction of the only copy of a work can never establish intent to abandon. We defer to the trial court's factual finding that WXIA intended to abandon portions of its program.

Nevertheless, WXIA erased only a small portion of its broadcast. The entire audiotape still survives, along with many portions of the videotape. The district court, while recognizing this fact, declined to issue an injunction against the use of segments of the news programs not erased by WXIA. It said that "the precise wording of an appropriately limited decree is unapparent." The fact that a court must make some difficult judgments should not prevent it from effectuating established legal rights. Moreover, the clear-cut test used by the district court to find an intent to abandon the copyright (destruction of the only copy) should make the formulation of the decree more manageable.

Thus, the trial court relied on irrelevant and insufficient grounds in its refusal to grant injunctive relief. It correctly found that TV News Clips had infringed the copyright of WXIA but abused its discretion by refusing to grant injunctive relief. Accordingly, the judgment is AFFIRMED IN PART, REVERSED IN PART, and REMANDED for further proceedings consistent with this opinion.

APPENDIX B

PACIFIC AND SOUTHERN COMPANY, INC., d/b/a WXIA-TV

v.

Carol DUNCAN, d/b/a TV News Clips.

Civ. No. C81-1106.

United States District Court, N.D. Georgia, Atlanta Division.

Oct. 13, 1983.

ORDER

ORINDA D. EVANS, Chief Judge.

This copyright infringement action is before the Court for findings of fact and conclusions of law following a bench trial.

This case presents the question whether off the air video taping of live television news broadcasts by a TV news monitoring service, followed by the marketing and sale of news tapes to interested members of the public, infringes the broadcaster's copyright under federal law. 17 U.S.C. § 101 *et seq.* The Defendant, a television news "clipping service," argues that its activities constitute a permissible fair use under the copyright statute, 17 U.S.C. § 107, or alternatively, that the First Amendment to the United States Constitution prohibits interference with its activities notwithstanding an otherwise valid copyright.

After due consideration of the evidence and arguments of counsel, the Court hereby finds and concludes as follows:

I. FINDINGS OF FACT

Plaintiff WXIA-TV is a television station in Atlanta, Georgia. It is duly licensed by the Federal Communications Commission to operate as Channel 11. It broadcasts a 90-minute news program every evening at 5:30 p.m. A notice of copyright appears at the end of each newscast.

TV News Clips ("News Clips") is the name under which Ms. Carol Duncan conducts a for-profit television news monitoring and clipping service.[1] News Clips videotapes Channel 11's news programs and the news programs of other stations. It contacts each person or company who is the subject of a newscast segment to see if they would like to purchase a copy. Customers pay $65 for an initial news clip purchase and $25 for subsequent purchases. The videotaping and sales of copies occur without WXIA's permission. Copies contain no notice of copyright, but the tape cassettes are labelled "For personal use only not for rebroadcast." News Clips informs purchasers that it is not affiliated with WXIA.

News Clips erases its tapes one month after the pertinent broadcast.

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1. The business was originally a one-person operation run out of Ms. Duncan's home; however, it has flourished and is now a full-fledged commercial operation.

   News Clips is a member of the International Association of Broadcast Monitors, an organization with from 20 to 30 members who provide news "clipping" and related services. News Clips' owner, Carolyn Duncan, is a past president of the association. Duncan provided evidence that another monitoring service, Videomonitoring Services of America, Inc., includes among its clients the Brooklyn Union Gas Co., Fairfield University, the Institute for Behavorial Research, Legal Services Corp., National Association of Manufacturers, the New York Stock Exchange and the United States Chamber of Commerce.

The instant litigation began with WXIA's discovery that News Clips had sold a tape of a feature from its March 11, 1981 evening newscast to Floyd Junior College in Rome, Georgia. The feature was a one minute, 45 secong segment concerning a newly installed "fitness trail" at the junior college. The segment showed individuals jogging on the trail (at least one of whom was a WXIA employee) and depicted various athletic equipment along the way. An on-the-scene reporter made salutary comments about the trail and the health benefits to be derived from using it.

After effecting the copyright registration which is a prerequisite to bringing a copyright infringement action, WXIA instituted the within suit. WXIA seeks damages for the infringement of its copyright on the fitness trail feature. In addition, it seeks an injunction against News Clips to stop future unauthorized copying or sales of copies of its news programs, plus recovery of the costs of this action, including attorneys' fees.

As one would expect, WXIA's news programs are made up of a variety of elements. Some are pretaped; some are live. These elements include, *inter alia,* on-the-spot coverage of primary news events, *e.g.,* a speech by a public official; "on-the-scene" comments by news reporters; news desk reports on the events of the day; feature stories such as the fitness trail sequence; weather reports; editorials; and miscellaneous commentary by the anchor persons at the news desk.

WXIA has made no effort to develop a market for sales of copies of its news casts or portions thereof. It receives infrequent requests for copies; however, when such requests are received they are accommodated as a

public service. The charge is $100 a copy. However, from time to time requests are made under circumstances which cause the station to impose additional requirements and/or refuse the requests. The evidence showed at least one occasion in which the station required a subpoena to be obtained where the news segment was going to be used in litigation. Also, the station will not provide newscast copies to political candidates. This is because of a concern that the copy might be used inappropriately to suggest involvement of the station in a campaign.

No one from Floyd Junior College appeared at trial to testify as to its motive in purchasing the fitness trail sequence. However, testimony concerning the perceived reason for purchases of the film clips generally was given at trial by Ms. Duncan, News Clips' owner. She believes the majority of her customers purchase clips to study and thereby improve the image they are projecting to the public. She pointed out that she has a number of repeat customers who regularly appear in the news. These include a large public utility, high-level state and federal officials, a teachers' lobbying group, and a corporation which regularly contracts with the Department of Defense. Similar testimony was given by a professional associate of Ms. Duncan's who conducts a news taping business in Canada. The Canadian company has contracts with the Canadian government, including specifically, a contract with Canada's Nuclear Energy Commission.

News Clips also sells clips to lawyers involved in litigation to which a news story may be relevant. Ms. Duncan conceded that a certain percentage of her customers—she thought between five and ten percent—are individuals who simply wish to purchase a story as a souvenir.

WXIA, on the other hand, asserts that the evidence does not establish with sufficient certainty why News Clips' clients purchase the clips or what they are doing with them. The Court thinks it reasonable to infer—and does infer—that some of News Clips' clients—for example, the repeat customers specifically mentioned—do purchase the clips in order to analyze and improve self image. However, the Court rejects as speculative the estimates of what percentage of Ms. Duncan's clients purchase news clips for the purpose of self study.

II. DISCUSSION

A. *Preliminary Issues*

Before turning to the substantive issues presented, there are unresolved preliminary issues concerning: (1) whether Plaintiff's March 11, 1981 newscast was "fixed" so as to be subject to copyright and (2) whether Plaintiff properly registered its claim of copyright so as to satisfy the statutory prerequisite for bringing suit. In order to rule on these issues, the Court must make certain further findings of fact. They are:

The fitness trail feature was pretaped.[2] During the March 11 broadcast, there was a live introduction of the feature by the anchor person; also, superimposed graphics were added stating the on-the-scene reporter's name and the location. While the program was being aired, a videotape of the finished product was made from a television set in the studio. As is its custom, WXIA kept that videotape for a period of one week, after which it was destroyed.

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2. This tape has both visual and audio aspects.

However, also in accordance with its customary practice, WXIA will retain the pre-taped fitness trail feature for five to seven years. WXIA retains written scripts of its live broadcasts for a period of one year, and audio tapes of each broadcast for an indefinite period. Thus, WXIA still has a script of the anchor introduction to the fitness trail sequence, the pretaped fitness trail feature, and the audiotape of the entire March 11, 1981 program.

On May 13, 1981, WXIA deposited with the Register of Copyrights an audio tape and transcript of the entire March 11, 1981 broadcast, as well as the pretaped fitness trail feature. On July 24, 1981, WXIA's counsel further deposited a description of the entire March 11 news program. WXIA received a certificate of copyright for the fitness trail segment on May 18, 1981, and a certificate for the entire broadcast on November 3, 1981.

It is a fundamental requirement for copyright protection that a work be "fixed in any tangible medium of expression." 17 U.S.C. § 102.

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transistory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C. § 101.

The fitness trail sequence was fixed when it was pretaped. The March 11 program as a whole was fixed at the time it was aired and the studio videotape was made.

Except in certain cases not relevant here, no copyright infringement action may be brought until the claim of copyright is registered with the Register of Copyrights in Washington, D.C. 17 U.S.C. § 411(a). Proper registration is a necessary condition precedent to filing suit.[3] A copyright owner may obtain registration of a claim by delivering to the Copyright Office an application, the specified fee, and an appropriate deposit of the work. 17 U.S.C. § 408(a). The deposit requirements are set forth generally in 17 U.S.C. § 408(b) and vary according to the nature of the work. As is discussed more fully below, the fitness trail feature is an "unpublished work"; hence, 17 U.S.C. § 408(b)(1) required that the deposit consist of "one complete copy or phonorecord." Additionally, special regulations applicable to a "transmission program," *e.g.*, a television program, also permitted registration of the March 11 broadcast as a whole by depositing an audiotape of the entire broadcast and a description of the program. 17 U.S.C. § 408(c); 37 C.F.R. § 202.21(g). The Court finds that WXIA's deposit of the pretaped version of the fitness trail feature on May 13, 1981 constituted a proper deposit under the provisions of 17 U.S.C. § 408(b)(1) and established copyright registration for the fitness trail feature. Additionally, WXIA's deposit of the audiotape and

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3. A certificate of registration does not determine the validity of the claim, but merely constitutes prima facie evidence. *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 908 (2d Cir.1980); *Moore v. Lighthouse Publishing Co., Inc.*, 429 F.Supp. 1304, 1308 (S.D.Ga.1977).

description of the entire March 11, 1981 broadcast sufficed to satisfy the alternative requirement for a deposit of a transmission program. Thus, WXIA's claim of copyright in the news cast as a whole was properly registered.

B. *Copyright and Television News: The Scope of Statutory Protection*

It is axiomatic that copyright protection does not extend to news "events" or the facts or ideas which are the subject of news reports. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir.1981); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir.1977), *cert. denied*, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 759 (1978). But it is equally well-settled that copyright protection does extend to the reports themselves, as distinguished from the substance of the information contained in the reports. *Wainwright*, 558 F.2d at 95; *International News Service v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918); *see Chicago Record-Herald Co. v. Tribune Assn.*, 275 F. 797 (7th Cir.1921); 1 Nimmer on Copyright § 2.11[B] (1983). Copyright protects the manner of expression of news reports, "the particular form of collocation of words in which the writer has communicated it." *International News Service*, 248 U.S. at 234, 39 S.Ct. at 70. Such protection extends to electronic news reports as well as written reports. *See* 17 U.S.C. § 102(a)(5), (6), and (7); *see also Iowa State University Research Foundations, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir.1980).

In the instant case, Ms. Duncan's copying of the fitness trail feature was not a mere attempt to relate the substance of the information contained in the feature.

Rather, it was a total reproduction embodying both the facts which were the subject of the feature, and the particular way in which those facts were presented. Therefore, WXIA is entitled to a judgment in its favor unless one of Ms. Duncan's defenses is meritorious. The Court now turns to an examination of each of these defenses.

C. *First Amendment*

Defendant argues that an unlimited copyright in television news violates the First Amendment.[4] She points to the public's interest in the fullest possible dissemination of news, and the unique ephemeral nature of television news broadcasts. She further asserts that a television station might elect either not to preserve its broadcast material in permanent form, or not to make broadcast copies readily available to members of the public. In such a case, she argues, prohibiting copying might be tantamount to sanctioning monopolization of information.

Courts and commentators have for years recognized a possible tension between copyright and first amendment freedom of speech. *See Triangle Publications, Inc. v. Knight-Ridder Newspapers*, 626 F.2d 1711 & n. 1 (5th Cir. 1980) (and cases cited therein); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press? 17 U.C.L.A.Rev. 1180 (1970); Patterson, Private Copyright and Public Communication: Free Speech Endangered, 28 Vand.L.Rev. 1161 (1975). Generally, however, "[c]onflicts between interests protected by the first amendment and the copyright laws thus far have been

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4. She suggests the copyright should be enforceable only against infringement by a competing broadcaster.

resolved by application of the fair use doctrine." *Wainwright Securities,* 558 F.2d at 95. Other courts have found that the copyright dichotomy between ideas and facts, which are not protected, and the form of expression, which is, is sufficient in nearly all cases to accommodate the relevant constitutional values. *See, e.g., Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broadcasting System, Inc.,* 672 F.2d 1095, 1099-1100 (2d Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982). In the words of Professor Nimmer:

> On the whole . . . it appears that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his works in that it renders his "ideas" per se unprotectible, but this is justified by the greater public need for free access to ideas as a part of the democratic dialogue.

1 Nimmer on Copyright § 1.10[B] (1983), at 1-76-1-77 (footnotes omitted).

No circuit has recognized a First Amendment exception to copyright apart from the doctrine of fair use. *See Roy Export,* 672 F.2d at 1099-1100; *Iowa State University Research Foundation,* 621 F.2d at 61 n. 6; *Triangle Publications,* 626 F.2d at 1172; *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.,* 600 F.2d 1184, 1188 (5th Cir.1979); *Walt Disney Productions v. Air Pirates,* 581

F.2d 751, 758-59 (9th Cir.1978), *cert. denied,* 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979); *Wainwright Securities,* 558 F.2d at 95. Some courts in dicta have, however, noted Professor Nimmer's view that for some works the "idea" and the expression of that idea may be so inseparable, and the work may be so infused with public interest, that both should be in the public domain and exempt from copyright. *Roy Export,* 672 F.2d at 1099-1100; *Iowa State University Research Foundation,* 621 F.2d at 61 n. 6; *Wainwright Securities,* 558 F.2d at 95. Professor Nimmer gives as examples Vietnam War photographs of the My Lai massacre or the Zapruder "home movie" of the Kennedy assassination.[5] 1 Nimmer on Copyright § 1.10[C] (1983), at 1-82 - 1-83. He suggests that the First Amendment protects a category of works that contribute to the "democratic dialogue," a category which he labels "news photographs." *Id.* at 1-84.

> Photographs would refer to all products of the photographic and analogous processes, including motion picture film and videotape, but would exclude other graphic works, such as paintings, sculpture, etc. . . . There is a definitional problem as to when a photograph is a ***news*** photograph. . . . Perhas a pragmatic definition would prove useful: *e.g.,* a photograph is a news photograph only if the event depicted in the photograph, as distinguish from the fact that the

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5. In *Time, Inc. v. Bernard Geis Associates,* 293 F.Supp. 130 (S.D.N.Y.1968), the court found the unauthorized use of the Zapruder film to be fair use. Professor Nimmer believes the case more soundly rests on a First Amendment rationale. 1 Nimmer on Copyright § 1.10[D] (1983) at 1-86 - 1-87. This Court agrees.

photograph was made, is the subject of news stories appearing in newspapers throughout the country.

Id.

While the Court finds Defendant's argument theoretically provocative, it has little applicability to the question of whether copying the fitness trail feature infringed Plaintiff's copyrights. The fitness trail feature is a "soft news" piece which, though informational, hardly fits in a category with film of the My Lai massacre. Moreover, Plaintiff has preserved the original film; a copy is available to anyone who wants one. Indeed, the fitness trail itself is available for viewing. Thus, the First Amendment offers no defense to Ms. Duncan.

D. *Fair Use*

Defendant argues that her copying of the fitness trail feature constituted a permissible "fair use" under 17 U.S.C. § 107. For the reasons hereinafter set forth, the Court rejects her argument.

Fair use has been defined in a much-quoted passage as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner [by the copyright]." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967), *quoting* Ball, The Law of Copyright and Literary Property 260 (1944). The doctrine has been described as "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir.1939). It was codified for the first time in the

Copyright Act of 1976, but in codifying the doctrine Congress did not seek to preclude further judicial development depending on the facts of each case. H.R.Rep. No. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. Code Cong. & Ad.News 5659, 5680.

Section 107 provides:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Defendant argues that her copying and sale of the fitness trail feature is a fair use taking into account the four factors listed under § 107 in subsections (1)-(4). She concedes that her activity is commercial, but she asserts that factors (1) and (2) under § 107 favor fair use because

the nature of the copyrighted work is news; also, the public interest favors the wider dissemination of news which she argues is facilitated by her distribution of news segments. Under factor (3), she argues that because the fitness trail feature is only a small portion of the March 11 broadcast, a finding of fair use is indicated. Finally, under factor (4) she contends that her sale of news clips in no way diminishes WXIA's news viewership; indeed, she points out correctly that the market for news clip segments has been created almost solely through her efforts.

In arguing that these four factors favor fair use, Defendant cites a binding decision of the Court of Appeals for the Fifth Circuit, *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir.1980).[6] That case holds that commercial use does not preclude a finding of fair use; also, it holds that the fourth fair use factor, effect of the use upon the potential market for the copyrighted work, is by far the most important factor.

Ms. Duncan's fair use defense fails because she overlooks important limiting language in § 107; also, she misidentifies the use which is relevant to "fair use" analysis in this case.

17 U.S.C. § 107 does not automatically require any use which is sought to be labeled "fair" to be analyzed under the guidelines set forth in subparagraph (1) through (4). Rather, it is only where the use is clearly for "pur-

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6. Cases decided by the Fifth Circuit Court of Appeals prior to October 1, 1981 are the law of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

poses such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," 17 U.S.C. § 107 (initial unnumbered paragraph), that the Court's interest in subfactors (1) through (4) is triggered. To interpret the statute otherwise would invite facile obliteration of copyright protection through the back door route of the fair use defense.

In determining whether or not Ms. Duncan's use of the news clips falls within a category similar to those set forth in § 107, the Court must first determine exactly what "use" is relevant here. Insofar as Ms. Duncan is concerned, the relevant "use" is simply her copying of the newscasts, and her subsequent sale of them. Whatever use her clients may make of these film clips is irrelevant.[7] Ms. Duncan is not being sued as a contributory infringer, *cf. Universal City Studios, Inc. v. Sony Corp. of America,* 659 F.2d 963 (9th Cir. 1981), *cert. granted,* 457 U.S. 1116, 102 S.Ct. 2926, 73 L.Ed.2d 1328 (1982), but rather as the primary infringer. Furthermore, Ms. Duncan is a stranger to any use which might be made of the news clips by her clients. In that respect, she is different from a classroom teacher who might distribute copies of copyrighted material for classroom use. *See* 17 U.S.C. § 107.

Having made this initial determination, it becomes readily apparent that Ms. Duncan's use is not for a purpose such as "criticism, comment, news reporting, teach-

---

7. The fair use defense would be considered from a different vantage point were the defendant here a person who copied WXIA's newscasts for a personal use. As a matter of fact, however, this possibility is moot due to WXIA's stated indifference to such copying for private personal use.

ing, scholarship, or research." That being the case, analysis of the four factors listed under § 107 is unnecessary.

Triangle Publications is factually quite different from the instant case. For that reason, its holding does not assist Ms. Duncan. In *Triangle,* Plaintiff's magazine was pictured in a newspaper advertisement prepared by Defendant, a competitor, which published a similar magazine. The ad made a direct comparison between the two magazines, picturing their covers side-by-side. The text of the ad gave reasons why Plaintiff's publication was second best. Plaintiff contended that the display of its magazine cover infringed its copyright; Defendant claimed fair use. The Court of Appeals for the Fifth Circuit discussed each of the four fair use factors under § 107, and ruled for Defendant. As mentioned above, in so doing it rejected Plaintiff's claim that the commercial character of the use was conclusive against a finding of fair use; also, the Court held that the fourth fair use factor was the most important, noting that use of the copyrighted material in the advertisement did not diminish the value of plaintiff's copyright. *Triangle Publications,* 626 F.2d at 1177-78.

What is important for purposes of the instant case, however, is the fact that Defendant's "use" in *Triangle* fell within the language of § 107 limiting its applicability to "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. Specifically, the advertisement was a classic form of "comment" on the copyrighted work In this respect, Defendant's comparative advertisement was conceptually similar to satire or parody, *see Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Pro-*

ductions, Inc., 479 F.Supp. 351 (N.D.Ga.1979), which are recognized forms of fair use. The justification for these uses lies not in society's interest in wider distribution of the copyrighted material, but rather in its interest in the infringer's creative use of the copyrighted material. *See* L. Seltzer, Exemptions, and Fair Use in Copyright 23-27 (1977). Comparative advertisement, like satire, in a productive and creative use of the copyrighted material. Ms. Duncan's copying and distribution, on the other hand, was not an inherently productive or creative use of the type referred to in § 107.

Therefore, her fair use defense fails.[8]

---

8. Ms. Duncan clearly does not qualify for, and thus has not sought the protection of the television news archives exemption set forth in the 1976 Copyright Act. *See* 17 U.S.C. § 108(f). Section 108(f) provides an exemption from copyright infringement for the "reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program. . . ." This exemption applies where:

> (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
>
> (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
>
> (3) the reproduction or distribution of the work includes a notice of copyright.

17 U.S.C. § 108(a).

The statute does not define "audiovisual news program," but the legislative history states that it is intended to apply to the daily newscasts of local, regional and nat-

(Continued on next page)

E. *Remedy*

As previously stated, Plaintiff seeks injunctive relief, statutory damages, and an award of costs including attorneys' fees.

As a general rule, a plaintiff is entitled to a permanent injunction when copyright liability has been established and there is a threat of continuing infringement. *Universal City Studios v. Sony,* 659 F.2d at 976; 3 Nimmer on Copyright § 14.06[B] (1983), at 14-53-14-54. However, the Court may omit injunctive relief where it would disserve the public interest. *See Id.* § 13.05[E][4][e], at 13-91-13-92.

With respect to any future sales of the fitness trail feature, injunctive relief is neither necessary nor appropriate. Defendant no longer has a copy of the feature; the circumstances do not suggest that she presently has access to Plaintiff's original. The real question is whether or not the Court should grant broad injunctive relief prohibiting Defendant from future copying of any of WXIA's newscasts. After consideration of the evidence presented, the Court declines to enter such an injunction.

(Continued from previous page)

ional television networks, interviews about current events, and on-the-spot coverage of news events. H.Conf.Rep. No. 1733, 94th Cong., 2d Sess. 73, *reprinted in* 1976 U.S. Code Cong. & Ad.News 5810, 5814. It does not apply to documentary or magazine-format public affairs programs. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 77, *reprinted in,* 1976 U.S. Code Cong. & Ad.News 5659, 5690.

Section 108 itself states that nothing in the television news exemption "in any way affects the right of fair use as provided by section 107." 17 U.S.C. § 108(f)(4).

The aim of copyright is to foster creativity. To this end, the statute gives the copyright holder the exclusive right to reproduce or distribute the work. *See* 17 U.S.C. § 106. In the instant case, however, Plaintiff destroys its broadcast videotapes a week after the broadcast. Thereafter, it retains only partial visual elements of the program. Since WXIA can only reproduce its news programs for a period of one week, but has never done so, it must be concluded that the post-broadcast market is relatively unimportant to it as a creative incentive. Hence, copyright objectives would be insubstantially served by broadly enjoining Defendant's sales of copies of Plaintiff's broadcasts.

At the same time, the Court must consider whether broad injunctive relief would infringe upon First Amendmen rights. While the various elements of Plaintiff's broadcasts vary in informational importance, *see* p. 3, *supra,* all material WXIA carries on its broadcasts is presumptively newsworthy and therefore infused with a high degree of public interest. Further, the Supreme Court has recognized that the broadcast media present "an unusual order of First Amendment values" due to the inherent difficulty in allocating a scarce number of broadcast frequencies among applicants. *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94, 101, 93, S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973). Under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.,* broadcasters are licensed by the federal government as public trustees and as such are required to serve the public interest. Under these circumstances, caution in fashioning a remedy is indicated and broad injunctive relief will not

be granted unless Plaintiff's entitlement to and need for such relief is clear and convincing.

The Court concludes that Ms. Duncan's sale of newscast copies does not substantially further public dissemination or perpetuation of news accounts. Since she detroys her tapes within a month of the broadcast, the only archival purpose served by her activity is that attendant to getting news clips into private hands (actually, mostly into corporate file folders). However, the fact remains that under Plaintiff's present procedure, film of news events of possibly great import could be destroyed a week after the broadcast, with no useful copy being available thereafter. In such a case, Defendant's systematic copying and sales could represent a modest social benefit.

The Court concludes, moreover, that broad injunctive relief would improperly prohibit distribution of parts of newscasts where Plaintiff no longer has any copyright protection. Where a copyright holder evidences an intention to abandon his copyright by an overt act of abandonment, protection ceases. 3 Nimmer on Copyright § 13.06 (1983). WXIA's destruction of its broadcast videotapes is certainly such an overt act. And while it may be that large parts of the broadcast can still be pieced together from taped, audio and script components, and some pretaped portions may be entitled to independent copyright protection, the precise wording of an appropriately limited decree is unapparent.

In summary, given the referenced First Amendment considerations, plus Plaintiff's lack of a clearly demonstrated entitlement to or need for broad injunctive relief, the request for such relief will be denied.

Plaintiff seeks statutory damages in lieu of actual damages. Section 504 of the Copyright Act provides that a plaintiff may elect between "actual damages and any additional profits of the infringer," 17 U.S.C. § 504(a)(1), or statutory damages "in a sum of not less than $250 or more than $10,000," 17 U.S.C. § 504(c)(1), but as much as $50,000 for "willful infringement." 17 U.S.C. § 504(c)(2). Plaintiff seeks the full $50,000 award, as well as attorneys' fees and costs as provided by 17 U.S.C. § 505.

The remedies of statutory damages and attorneys' fees are unavailable to Plaintiff in this action. 17 U.S.C. § 412 provides in pertinent part that

> In any action under this title, other than an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall me made for—
>
> (1) any infringement of copyright in *an unpublished work* commenced before the effective date of its registration. . . . (emphasis supplied).

Section 411(b) provides

> (b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and section 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

> (1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and
>
> (2) makes registration for the work within three months after its first transmission.

17 U.S.C. § 411(b).

The fitness trail feature is an unpublished work. "Publication" under the statute is defined as

> The distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. § 101.

> To perform or display a work publicly means
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable

> of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id.

A transmission, then, is not a publication. Congress has defined "transmission program" as "a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit." *Id.* The legislative history shows that this definition encompasses non-syndicated radio and television programs. H.R.Rep. No. 1476, 94th Cong., 2d Sess. 152, *reprinted in* 1976 U.S. Code Cong. & Ad.News 5659, 5768. Live television news broadcasts clearly fall into the category of unpublished transmission programs.

Plaintiff's only possibility for an award of statutory damages is thus to fit within Section 411(b). Plaintiff cannot fit within that section for two reasons. First, the fixation of the pretaped fitness trail feature did not first occur at the time of the transmission. The feature was fixed earlier, when it was pretaped. Secondly, even if one were to assume that the fixation only occurred as the broadcast was being aired, Plaintiff did not give the notice referred in Section 411(b). Therefore, statutory damages and attorneys' fees are not awardable to Plaintiff.

By its own admission, Plaintiff has suffered virtually no actual damage from the sale of the fitness trail segment. Although WXIA makes tapes available, it does not actively attempt to market them and admits that it has no real concern that it ever sell any tapes. Its actual damages in this case therefore are trivial. Defendant sold the

fitness trail segment for $55.[9] The Court did not hear evidence on News Clips' profit per tape, but estimates it at $35, also a trivial amount. Under these circumstances, Plaintiff's actual damages, including Defendant's profits, are *de minimis*. *See Shapiro, Bernstein & Co. v. Bleeker,* 243 F.Supp. 999 (S.D.Cal. 1965), *aff'd* 367 F.2d 236 (9th Cir.1966). The Court will award damages in the amount of $35.00.

Finally, as the prevailing party, Plaintiff seeks to recover its costs. Under former section 116 of the copyright statute, the award of costs to the prevailing party was mandatory. *Boz Scaggs Music v. KND Corp.,* 491 F.Supp. 908, 915 (D.Conn. 1980). Current section 505, 17 U.S.C. § 505, commits the award of costs to the court's discretion. H.R.Rep. No. 1476 at 163 *reprinted* in 1976 U.S.Code Cong. & Ad.News at 5779. Costs may even be awarded to the losing rather than the prevailing party if the court should so determine. *Kepner-Tregoe, Inc. v. Carabio,* 203 U.S.P.Q. 124, 136 (E.D.Mich. 1979). The Court orders that no costs be awarded in this action.

CONCLUSION

Judgment is to be entered for Plaintiff in the amount of $35.00. Each side shall bear its own costs.

---

9. News Clips has since raised its price per tape to $65.

APPENDIX C

IN THE UNTED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8782

PACIFIC AND SOUTHERN COMPANY, INC.,
d/b/a WXIA-TV,

Plaintiff-Appellee,
Cross-Appellant,

versus

CAROL DUNCAN, d/b/a TV NEWS CLIPS,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion October 26, 1984, 11 Cir., 1984, — F.2d —).
(December 7, 1984)

Before FAY and JOHNSON, Circuit Judges, and
YOUNG*, District Judge.

PER CURIAM:

(×) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

---

*Honorable George C. Young, U.S. District Judge for the Middle District of Florida, sitting by designation.

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Court

APPENDIX D

Constitutional and Statutory Provisions

United States Constitution

Article I, § 8, cl. 8:

> The Congress shall have Power * * * To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Code, Title 17:

Section 107. Limitations on Exclusive Rights: Fair Use

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

APPENDIX E

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December 7, 1984

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Video Monitoring Services of America, Inc.
330 West 42nd Street
New York, New York 10036

Dear Sir or Madam:

I am writing on behalf of my client, Pacific and Southern Company, Inc. doing business as WXIA-TV, in Atlanta. My client is an affiliate of The Gannett Broadcast Group.

I and my client were most surprised to see your recent brochure, a copy of which I enclose, which announces that you make videotape copies for commercial purposes of all news broadcasts which are produced and copyrighted by my client as well as other television broadcasters and networks.

This practice clearly infringes the copyright of my client in its originally produced copyrighted news broadcasts.

We demand that you cease and desist, immediately and permanently, from all copying of WXIA-TV's local newscasts.

If you are in any doubt whatsoever about the legal status of such unlicensed copying for commercial purposes of copyrighted news broadcasts, you should review the decision by the United States Court of Appeals for the Eleventh Circuit in the lawsuit which my client brought against an Atlanta copyright infringer, TV News Clips, which engaged in the same prcatices. The enclosed opinion was rendered on October 26, 1984.

I look forward to prompt receipt of your assurance that no additional copying of WXIA-TV's copyrighted news broadcasts will take place.

We will deem any copying by Video Monitoring Services of my client's copyrighted news broadcasts on or after the date of your receipt of this letter to be willful infringement of copyright which will give rise to civil claims for injunctive relief and for statutory, actual and punitive damages, and which will be in violation of the criminal law as well.

My client intends to take full advantage of all available avenues of legal recourse.

Very truly yours,

/s/ James C. Rawls

JCR/ec
Enclosure

Office-Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1277

In The

Supreme Court of the United States

—o—

CAROL DUNCAN, d/b/a TV NEWS CLIPS,
Petitioner,

vs.

PACIFIC AND SOUTHERN COMPANY, INC.,
d/b/a WXIA-TV,
Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—o—

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BEST AVAILABLE COPY

PARTIES TO THE PROCEEDING

In the caption of the Petition for Writ of Certiorari, Respondent is incorrectly referred to as "Southern and Pacific Company, Inc." Respondent's correct name is "Pacific and Southern Company, Inc."

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Pacific and Southern Company, Inc., d/b/a WXIA-TV, Respondent, respectfully opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit sought by Carol Duncan, d/b/a TV News Clips, and will show this Court that this cause should not be reviewed by this Court pursuant to Rule 17.

———o———

STATEMENT OF THE CASE

The case before the Eleventh Circuit presented straightforward issues of copyright law: had the District Court correctly concluded that the copyrighted news broadcasts of plaintiff WXIA-TV (Respondent here, an Atlanta television broadcaster) were infringed by the defendant Carol Duncan, d/b/a TV News Clips (Petitioner here), who without consent or license regularly videotaped WXIA-TV's newscasts for purely commercial purposes and then sold videocassette copies of as many portions of the newscasts as she could sell, or, alternatively, was Mrs. Duncan correct in contending that her copying was a "fair use" of copyrighted materials and that the First Amendment protected her copying and selling; and, if the District Court correctly found that WXIA-TV's copyrights were infringed, was WXIA-TV entitled to an injunction against future copying, which injunction the District Court declined to enter.

In its unanimous opinion, written by Judge Frank M. Johnson, the Eleventh Circuit agreed with the District Court that Mrs. Duncan's copying was an infringement of copyright and not protected by the "fair use" doctrine or the First Amendment. It also instructed the District Court to enter an injunction against future infringements. The District Court is now considering the appropriate scope of the injunction.

SUMMARY OF ARGUMENT

Properly viewed, this case does not present *any* of the three "Questions Presented" which Petitioner states, and is not in conflict with any decision of this Court or any other court (and indeed, as Petitioner admits, raises issues of first impression). These facts, and the clear correctness of the unanimous Eleventh Circuit decision, render the Petition insubstantial.

Petitioner's first two questions presented are premised upon denial of "reasonable access" to television news reports, and mischaracterize the facts, which reveal that WXIA-TV provides virtually complete access, yet Petitioner provides almost none.

Petitioner's third question presented is similarly non-existent in fact. The question assumes that what WXIA-TV has protected in this case are "future works which are to be destroyed shortly after they are created." In fact, WXIA-TV does not destroy any part of the work.

The legal arguments which Petitioner makes are unsupportable even if her erroneous factual assumptions are shared.

Petitioner makes the novel argument (Question 1) that the First Amendment—which according to decisions of this Court does not guarantee access even to many news sources—should guarantee her "access" to copy for her own profit but without compensation to WXIA-TV secondary reports of news produced at the expense and through the creativity of WXIA-TV. Petitioner's First Amendment argument is made without any analysis whatsoever, and Petitioner does not even advise this Court of the volumes of precedent which her argument contradicts.

Petitioner's second question deals with the "fair use" doctrine, but Petitioner's legal argument seeks a departure from that doctrine rather than an application of it. The four "fair use" factors articulated by Congress (17 U.S.C. §107) and applied with precise attention to fact and to precedent by the Eleventh Circuit (App. A4-13, 744 F.2d at 1494-98) militate strongly in WXIA-TV's favor:

(1) the first factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes," favors WXIA-TV because Mrs. Duncan's purpose is commercial only and is completely unproductive (see Eleventh Circuit's discussion at App. A8-9, 744 F.2d at 1496);

(2) the second factor, "the nature of the copyrighted work," presents a close question: the "news" nature of WXIA-TV's copyrighted works, which in some cases might give rise to a fair use defense, does not do so in this case because Mrs. Duncan does not disseminate news and because the other three factors strongly favor WXIA-TV (see App. A11-12, 744 F.2d at 1497);

(3) the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," favors WXIA-TV: Mrs. Duncan uses all of each work because she copies all for commercial purposes, then tries to sell as much as possible (see App. A10-11, 744 F.2d at 1497);

(4) the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," also favors WXIA-TV: Mrs. Duncan injures WXIA-TV's potential market for sales of videotapes of news stories and produces actual as well as presumed harm (see App. A9-10, 744 F.2d at 1496-97, and *Sony, infra*, 78 L.Ed.2d at 598).

Petitioner, unable to quarrel with the Eleventh Circuit's application of the "fair use" law, therefore departs from the four statutory factors (which Petitioner mentions only in passing at page 17 of her Petition, footnote 10) and argues for a very different "fair use" rule which, squarely contradicting the statute and decades of consistent precedent, presumptively authorizes "commercial" and "competitive" uses as fair, and brands the statute and the unanimous Eleventh Circuit decision as products of "confusion" (Petition, pp. 15-23).

Finally, Petitioner suggests that the copyright law is being applied to her in an unconstitutional way because it does not in the current case guarantee a public benefit. This argument, too, is unavailing: of course there is a clear public benefit which WXIA-TV provides by broadcasting news for free several times each day; and Congress's law-making in the copyright field is proper even if no public benefit in this case had been derived because Congress created an incentive to produce works which often will benefit the public, and no court has held that the public benefit must be guaranteed in the case of every copyrighted work as a prerequisite to copyright protection.

The sole attractiveness, then, of the Petition lies in its depiction of Petitioner's needed new industry which is threatened with collapse by the decisions in the two lower courts. But this depiction, too, is incorrect: her industry serves no useful function which cannot lawfully be provided by others, but her industry can survive if it is willing to pay license fees for the works which it copies.

This brief will address the Petitioner's departures from fact and from law in approximately the sequence employed in the Petition.

ARGUMENT AND CITATION OF AUTHORITIES

I. The Petitioner's "Questions Presented" Are Based On Facts Not Present Here

A. *The Infringing "Broadcast Monitoring" Industry*

Petitioner's appealing description of an innovative, benevolent, new, growing, and unique "service" industry, euphemistically described as the "broadcast monitoring" industry, is unsound.

The business of the industry is *not monitoring*, but *copying*. "Monitoring" of televised news reports is obviously lawful and obviously does not require copying. "Copying" of *all* of original copyrighted news reports, without license, and for the sole purpose of sale of as many copies of as much of the newscasts as possible, in the complete absence of some productive addition (such as analysis, criticism, or abstraction) to the copyrighted original, is what is at issue in this case.

Petitioner's analogy to the "newspaper clipping service" does not aid her. Because a newspaper is bought, the purchaser may do with it exactly as he wishes: the articles may be "clipped" from it and forwarded to others without raising a hint of a copyright issue because of the obvious absence of copying. Thus a "newspaper clipping service" is strictly legal. The broadcast "monitor," on the other hand, does not purchase a newscast. Instead, the staple raw material of the "industry," the videotape of the newscast, is copied.

Petitioner's case for the valuable service offered by the "monitoring" "industry" overlooks other key facts as well.

First is the fact that the "industry" may operate perfectly lawfully by *obtaining licenses* from the television stations or

networks whose broadcasts are to be copied. The precise importance of this case to the Petitioner's "industry" thus lies in Petitioner's effort to save the industry the need to pay anything at all for its *entire product*, even though the product is created solely by the skill, energy, resourcefulness, and expense of others.

Mrs. Duncan nowhere tells this Court, nor did she tell the lower courts, why her profitable business, indeed the entire "industry," cannot or ought not pay anything for the cost of the "goods" (videotapes) which it sells. Thus, while the newspaper clipping service pays the asking price for its goods, the "broadcast monitor" wishes to appropriate the goods (from the producer and owner, the television station) free of charge—and yet wishes to charge its own customers for the same goods which it denies that it should pay for!

Indeed, the record in this case clearly reveals that Mrs. Duncan never even tried to get a license from any of the four Atlanta newscasters whose broadcasts she routinely copies. (Tr. 101-02.)

Second is the overlooked fact that if a demand indeed exists for such "services," the demand may be met lawfully in at least three ways even absent a responsible (*i.e.*, licensed) "broadcast monitor." This Court's decision in *Sony Corporation of America v. Universal City Studios, Inc.*, 104 S.Ct. 774, 78 L.Ed.2d 574, 52 U.S.L.W. 4090 (1984), *reh. denied*, 104 S.Ct. 1619, 80 L.Ed.2d 148 (1984) (hereinafter "*Sony*"), probably means that one of Mrs. Duncan's "clients" desiring to have a copy of a televised news report about him, her, or it could lawfully make a copy, solely for internal use, directly off the air. If the client learned of such a news report only after it aired, it could purchase a copy from the television station itself.[1] Mrs.

Duncan's industry may be more convenient than these two alternatives (only because she routinely copies all local news broadcasts) but Congress far-sightedly provided for even this convenience to be lawfully provided by a library or archive.[2]

In sum, then, the Petitioner's "industry" seeks in this case a windfall which, at the expense of television producers, will spare the broadcast copiers the need to pay the ordinary cost of doing business; and the windfall is not only unnecessary to the industry which could obtain licenses to conduct business lawfully, but the industry is unnecessary itself given the existing legal framework and the farsighted congressional scheme.

B. *WXIA-TV's Policies Concerning Retention and Sale of Videotapes of Its News Reports.*

Petitioner's treatment of WXIA-TV's practices is also unsound.

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[1] WXIA-TV is happy to sell videotapes of such reports to anyone, as will be discussed.

[2] Pursuant to Section 108 of the Copyright Act, libraries and archives may copy broadcasts off-the-air, *provided* the copies made are open to the public and researchers, are not used for any commercial purpose, are confined to one copy of each broadcast, and include a notice of copyright. It is interesting to note that Congress's four carefully constructed conditions with which libraries and archives must comply are *all* violated by Petitioner: her videotapes are not open to anyone, but must be bought; her purposes are only commercial; she sells as many copies as she can; and she does not include a notice of copyright. Of course it is not plausible that Congress, which placed these strict conditions on libraries and archives which serve the public, intended to allow Petitioner and her industry to violate all of these restrictions for purely commercial purposes under the guise of "fair use," the section of the 1976 Copyright Act immediately preceding the "archive" exemption.

As Petitioner admits (Petition, p. 6), WXIA-TV retains the scripts and complete audiotapes for all of its newscasts. Although Petitioner goes no further, this Court should know that the scripts are retained for a year and audiotapes are retained indefinitely. (Tr. - 30, 35, 36, 42, 68, 69.)

Petitioner completely fails to mention the important undisputed fact that all of the videotapes of the individual news stories themselves (which are taped before broadcast or taped live outside the studio) are routinely retained for five to seven years by WXIA-TV. (See App. A2, A24, 744 F.2d at 1493, 572 F. Supp. at 1191.)

Therefore, although it is true that WXIA-TV usually erases after one week the master videotape of the entire newscast (this is the "fixation" videotape which is recorded simultaneously with the live broadcast), the only portions of its newscasts which WXIA-TV cannot reproduce with precision after that week are the "visual element of segments of the show broadcast live from within the studio." (App. A2, 744 F.2d at 1493.)

Certainly WXIA-TV's retention, then, compares more than favorably with that of Mrs. Duncan, who retains nothing for longer than four weeks. (Tr. 106-07.)

Thus Petitioner's third "Question Presented" (Petition, p. i) is predicated on a mischaracterization of fact: "copyright protection for future works which are to be destroyed shortly after they are created" is not an issue, since erasure of the videotape does not and cannot "destroy" any of the copyrighted works. Only one embodiment of the work is destroyed, and the other embodiments of virtually all elements of the work (the script, the audiotape, and the individual news stories) remain.

The access provided by WXIA-TV to its newscasts is extraordinarily broad. First, WXIA-TV produces its newscasts at a cost borne by it alone, and broadcasts the newscasts free of charge over the air to anyone in and well beyond the Atlanta metropolitan area who desires to watch and listen. This is broad, free primary access, and WXIA-TV broadly permits secondary access as well. As stated by the Eleventh Circuit: "WXIA has always honored requests to view tapes and usually allows persons to buy the tapes they want." (App. A2, 744 F.2d at 1493.)[3]

Thus, WXIA-TV's access policies—providing almost total access—are more than reasonable, and vastly broader than Petitioner's, and the Petitioner's first two "Questions Presented" (Petition, p. i), which are premised upon deprivation of "reasonable access" to news broadcasts, are not in the case.

Petitioner has made no record that other television stations are less generous than WXIA-TV in providing access to their newscasts, or are less energetic than WXIA-TV in retaining tapes and scripts. This failure of proof alone makes the present record particularly inappropriate for certiorari.[4]

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[3] The Eleventh Circuit explained the sole exceptions to this broad access policy in a footnote (number 1): "The tapes cost one hundred dollars. WXIA will not sell tapes to political candidates because the sale could appear to be an endorsement or other show of support for the candidate. Out of a similar concern over favoritism, the station asks for a subpoena before selling a tape that will be used in litigation."

[4] Regrettably, certain unjustifiable remarks in the Petition of a factual nature must be briefly touched upon.

Petitioner repeatedly states with emphasis that WXIA-TV does not customarily "register" its claim of copyright. (For example, the statement appears four different times on pages 6 and 7 of the Petition.) Although the old copyright law made registration important to the existence of a copyright, the fact is of no significance under the 1976

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II. Petitioner's Legal "Questions Presented" Are Thus In Fact Not Presented.

Petitioner's request that this Court consider denial of, or a right to, "reasonable access" to copyrighted news broadcasts (her "Questions Presented," numbers 1 and 2) cannot be satisfied by certiorari in this case, since WXIA-TV provides near-total access, and far more access than Petitioner provides.

Her request that this Court consider copyright protection for "future works which are to be destroyed shortly after they are created" (Petitioner's question 3) is similarly inapplicable to this record: the work is never destroyed, and except for a small number of live in-studio visual elements, no embodiment of the work is destroyed by WXIA-TV.

III. The Eleventh Circuit's Decision in this Case of First Impression Is Not in Conflict with Any Precedent.

As Petitioner acknowledges, this is a case of first impression. The Eleventh Circuit's decision not only is not in conflict with any precedent, but was mandated by earlier decisions of

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copyright law, which omitted the registration prerequisite to copyright protection, and requires registration only as a predicate to a legal action to enforce the copyright after the infringement. 17 U.S.C. §411(a). Regular registration of copyrighted newscasts, then, would be foolish as well as costly. Here, both the Copyright Office and the two lower courts accepted WXIA-TV's registration of the copyrighted works involved in this case (App. A23-26, 572 F. Supp. at 1190-91; App. A4-5, 744 F.2d at 1494), and News Clips chooses not to make "registration" an issue presented in its Petition for this Court's review; and the repeated emphatic remarks about non-registration, which seek to conjure up distrust toward Respondent and the lower courts founded in the fond memory of the repealed law, are entirely out of place.

Finally, Petitioner falsely implies, contrary to the express terms of the Copyright Act and the two holdings below, that WXIA-TV misled the Copyright Office by submitting a claim of copyright on a work which

(Continued on next page)

this Court and the lower federal courts, most recently the *Sony* decision of this Court.

Precedent establishes several fundamental principles which made the Eleventh Circuit's decision inevitable.

The first principle is that total verbatim copying is virtually never found to be a fair use. *See Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937); *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *affirmed by an equally divided court*, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583 (1958); *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied* 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979); *Quinto v. Legal Times of Washington, Inc.*, 506 F.Supp. 554 (D.D.C. 1981); 3 NIMMER ON COPYRIGHT (1984) Sections 13.05 [A][3], 13.05 [D][1].

So far as Respondent is aware, in only two cases has such substantial copying been held to be a fair use. In the first, *Williams & Wilkins Company v. United States*, 487 F.2d 1345

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had not been properly "fixed" in violation of 17 U.S.C. §101. This misstatement (the "Copyright Office had no way of knowing . . .", etc.) appears at page 8 of the Petition, and is repeated in substance at pages 24-25. Of course the copyright in the entire news report was "fixed" when the master videotape was created, and the fixation need only exist for a period of "more than transitory duration" (17 U.S.C. §§101, 102), not forever. And nowhere is it required that the "registration" copy deposited with the Copyright Office be the "fixation" copy itself. Here again, then, the Copyright Office and both lower courts agree that WXIA-TV properly "fixed" its broadcasts to achieve copyright protection, and, later, properly deposited a copy of the work in order to become entitled to judicial remedies for enforcement. (See App. A4-5, 744 F.2d at 1494; All, 744 F.2d at 1497; and A24-26, 572 F. Supp. at 1191.) And here again, Petitioner does not directly challenge these portions of the holdings, preferring to misstate the law and the holdings to her advantage.

(Ct. Cl. 1973), *affirmed by an equally divided court*, 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975), the Court of Claims held, in a 4-3 decision that was affirmed by an equally divided court, that non-profit institutions that supplied from their libraries strictly limited numbers of copies of medical research articles contributed by unpaid authors, which articles were often unavailable elsewhere to medical researchers, for use in their own scientific work, were engaged in a fair use of the articles. And, of course, in *Sony* this Court found that non-commercial in-home videotaping of television programs for personal use is a fair use. None of the factors which supported findings of fair use in those cases is present in this case.

The second principle is that where, as here, the use is purely commercial, it almost certainly is not fair. *See MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980); *Association of American Medical Colleges v. Mikaelian*, 571 F.Supp. 144 (E.D.Pa. 1983), *affirmed* 734 F.2d 3 (3d Cir. 1984), 3 NIMMER ON COPYRIGHT (1984) Section 13.05 [A][1]. As this Court pointed out in *Sony*, a commercial use is *presumptively* unfair and the likelihood of harm to the copyright owner may be presumed. 78 L.Ed.2d at 596-98. No societal benefit is facilitated by Petitioner to cause that presumption to be overcome.

Closely associated with the second principle is the third. Petitioner's commercial use of Respondent's work in its entirety decreases the potential market Respondent would have for sales of its own news clips. This damage to Respondent's potential market precludes fair use. 17 U.S.C. §107(4); *Pacific and Southern Company, Inc. v. Duncan*, 744 F.2d 1490, 1496-97; *Sony, supra*, 78 L.Ed. 2d at 596-98; 3 NIMMER ON COPYRIGHT (1984) Section 13.05 [A][4].

Until *Sony* the fourth principle often was found sufficient by itself to preclude a finding of fair use. That principle is that unproductive or uncreative uses are unfair. *See Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981); *Dow Jones & Co., Inc. v. Board of Trade*, 546 F.Supp. 113 (S.D.N.Y. 1982); 3 NIMMER ON COPYRIGHT (1984) Section 13.05 [A][1]. Although this Court in *Sony* rejected "productive use" as an absolute prerequisite to fair use, it found that principle "helpful in calibrating the balance." *Sony*, 78 L.Ed. 2d at 600, n. 40. Petitioner's use is neither productive nor creative, tipping the balance in the Respondent's favor.

Fifth is the principle that, although news is not copyrightable, expression of the news is. *See Wainwright Securities, Inc. v. Wall Street Transcript Corporation*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 759 (1978); *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57 (2d Cir. 1980); *New Boston Television, Inc. v. Entertainment Sports Programming Network*, CCH Copyright Law Decisions ¶ 25,293 (D.Mass. 1981); *Quinto v. Legal Times of Washington, Inc., supra*; *Roy Export Establishment of Vaduz, Liechtenstein, Black, Inc. v. Columbia Broadcasting System, Inc.*, 503 F.Supp. 1137 (S.D.N.Y. 1980), *affirmed*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982). Cf. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195 (2d Cir. 1983), *cert. granted*, 104 S.Ct. 2655, 81 L.Ed.2d 362, 52 U.S.L.W. 3860 (1984).[5] That

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[5] The grant of certiorari by this Court in *Harper & Row* furnishes no reason to grant the Writ in this case or to hold this case pending this Court's *Harper & Row* ruling. *Harper & Row*, unlike this case, involves questions of fair use which are close and weighty, and the issues in *Harper & Row* are most unlike those in this case. The alleged infringer in *Harper & Row*, Nation Enterprises, in fact disseminates information

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principle works against Petitioner, as well. Respondent does not seek copyright protection for news, only for its expression of the news. Petitioner does not seek to disseminate news, only to sell Respondent's expression of it.

Taken together, the foregoing principles compel the conclusion that Petitioner's use is not fair and that the Court of Appeals was bound by precedent so to find. Each such principle, taken singly, would have likely been fatal to Petitioner's "fair use" argument; but when Petitioner's total verbatim copying is considered together with her total commercial purpose, her appropriation of WXIA-TV's potential market, the absence of any value she adds to WXIA-TV's original news reports, and her taking of WXIA-TV's original expression of the news, Petitioner's position is worse than insubstantial, and the Eleventh Circuit's unanimous ruling could not have been different.

IV. Petitioner's Discussion of Legal Issues is Seriously Flawed.

A. *The free speech non-issue.*

Petitioner postulates a right under the First Amendment "to receive information and ideas." Petition at 10. While it is true that such a right has been found under some circumstances, it

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to a broad public, an activity in which Petitioner here is not engaged. And as the Eleventh Circuit in its decision in the present case pointed out, the *Harper & Row* facts involve a use of "material from the book that was for the most part not copyrightable at all. Furthermore, the public interest in the average news story is far less than the interest in presidential memoirs." (App. A12, 744 F.2d at 1497, n. 12.) Thus the Second Circuit's decision in *Harper & Row* does not aid Petitioner; and should this Court reverse in *Harper & Row*, Respondent's position would be even further strengthened.

has no bearing whatsoever on this case. WXIA-TV's provision of access[6] alone defeats Petitioner's attempt to benefit from any right of access.

In addition, there simply does not exist a general right of access by the public, by Petitioner, or by Respondent, even to every primary source of information, *i.e.*, the event or information itself. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 585, 100 S.Ct. 2814, 65 L.Ed.2d 973, 995 (1980); *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), *reh. denied*, 382 U.S. 873, 86 S.Ct. 17, 15 L.Ed.2d 114 (1965); *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966), *reh. denied*, 385 U.S. 1020, 87 S.Ct. 698, 17 L.Ed.2d 559 (1967); *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976). Only in certain circumstances and to certain historically public primary happenings has a right of access been recognized. *See Richmond Newspapers, Inc. v. Virginia, supra*; *Gannett Company, Inc. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979); *Press-Enterprise Company v. Superior Court*, 104 S.Ct. 819, 78 L.Ed.2d 629, 52 U.S.L.W. 4113 (1984). If there were a complete right of access, there would obviously be no need for legislation such as the Freedom of Information Act, 5 U.S.C. §552, open records laws, or "sunshine" laws to guarantee access.

If there is no right of access to many primary sources of

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[6] It should be remembered that Respondent honors and fosters the public's right to receive information and ideas by broadcasting for free to the public and providing other access as well. See discussion, *supra*, at 9.

news, there certainly is no right of access to secondary sources, such as Respondent's news programs.

The alleged "right of a citizen to use the services of a broadcast monitor," Petition at 11, is also not an issue in this case. Rather, the issue is whether the broadcast monitor itself is exempt from paying a license fee for the copyrighted works which it copies and sells.

As ably put by the Eleventh Circuit in dealing correctly with Petitioner's First Amendment "access" argument:

> "Because the public already has access to this material and TV News Clips does not offer any access that WXIA could not provide, TV New Clips' activities fall well beyond whatever protections might be available to further this public access interest. The First Amendment does not conflict with WXIA's effort to enforce its copyright in this case." (App. A14, 744 F.2d at 1498.)

B. *The Constitutional copyright non-issue.*

It is true, as Petitioner states, that among the purposes of copyright are the desires to promote learning and benefit the public. Congress has the responsibility to decide how those goals are to be achieved, however, *see, e.g., Sony, supra*, 78 L.Ed.2d at 584, and to that end it has chosen, as the Court of Appeals correctly observed, to create an incentive to offer the public benefits by providing access, not to create a command to do so. (App. A14-15, 744 F.2d at 1498-99.) The Court of Appeals also correctly pointed out that the goals of the Copyright Clause are achieved with respect to Respondent's work, by broadcast, by access to the work in its entirety for seven days, and by essentially permanent access to the work in virtually its entirety. (App. A15, 744 F.2d at 1499.)

Petitioner raises the spectre of "perpetual" copyright, but her concern is purely theoretical. Petitioner has decided that Respondent's works are of no commercial value to her after four weeks from their broadcast, and destroys her copies at that time. Thus, "perpetual" copyright protection, if a concern, would *not* be remedied by Petitioner. It could, however, be remedied by a true "fair use" and, by Congress's leave, by libraries and archives. This is not, therefore, an appropriate case in which to address the non-issue of "perpetual" protection.[7]

C. *The "fair use" copyright non-issue.*

Whether, as is claimed by Petitioner, the doctrine of fair use permitted a small number of competitive uses a century ago has no relevance to today's Copyright Act and the present concept of fair use. As Petitioner admits, the copyright laws have prohibited unauthorized copying since 1909. *And see Sony, supra*, 78 L.Ed.2d at 605 (Blackmun, J., dissenting). Commercial uses have consistently been held to be unfair. *See* citations, *supra*, at 12.

In *Sony*, for example, this Court decided that commercial uses are *presumptively* unfair. 78 L.Ed.2d at 596-98. And Section 107 of the Act reinforces that view. The very first factor that must be considered in a fair use analysis is the purpose and the character of the use, "including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. §107(1).

That Petitioner's use is commercial bears on the fourth statutory fair use factor, the effect of the use upon the potential

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[7] "Perpetual" copyright is an imaginary concern for another reason: the District Court, as this brief is printed, has not yet entered an injunction. If that injunction protects the copyrighted broadcasts for longer than the appropriate limited duration granted by Congress, Petitioner will be free to appeal.

market or value of the copyrighted work, as well. If the infringing use is for commercial gain the likelihood of harm to the copyright holder "may be presumed." *Sony*, 78 L.Ed.2d at 598. Of course, in this case harm was proved. (App. A9-10, 744 F.2d at 1496-97.)

Petitioner would have this Court adopt a new *per se* test which overrides the fair use analysis and replaces the language of the "fair use" section, in which test the copyright owner would be required to show that the infringing use creates a disincentive to produce which more than offsets the benefit inherent in allowing more viewers to see television programs. Petition at 16. That has never been a fair use test, however, and it would be at odds with both Section 107 and *Sony*, in which this Court simply applied the statutory factors. The Court's only mention in *Sony* of an incentive to create was to observe that a noncommercial use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the "author's incentive to create." 78 L.Ed.2d at 597.

That consideration is, of course, remote from this case because Petitioner's use is commercial and the harmful effect upon the potential market for Respondent's work has been demonstrated. And Petitioner does not even provide the claimed benefit of allowing more viewers to see Respondent's programs. She merely permits some viewers to obtain souvenirs of small portions of the programs.

Thus, "confusion" about the "fair use" doctrine surfaces, not in the decisions of the lower courts, but only in Petitioner's argument. Petitioner's invitation to reject Congress's "fair use" provision to enable her to take, for commercial purposes, the entirety of WXIA-TV's costly product, must be rejected.

CONCLUSION

The reasons for denying the Writ of Certiorari sought by Petitioner are numerous and persuasive.

There is no conflict in the law, and indeed the issue of first impression presented was decided correctly as compelled by this Court's *Sony* ruling, a huge body of case law, and the 1976 Copyright Act. The only four judges ever to apply the statutory "fair use" formula to commercial copying of televised news broadcasts have agreed that Petitioner Duncan is in no sense a "fair user."

Petitioner's "industry" has shown no need that it be spared the requirement of paying a license fee for its sole product.

Petitioner has sought no license, and has not shown that the television industry in general or WXIA-TV in particular (which was not asked to grant Petitioner a license) denies licenses.

Petitioner's service, if needed, may be lawfully provided in several ways even if her "industry" perishes.

The facts of this case contradict the asserted factual bases of the questions which Petitioner seeks to present.

The legal questions raised in Petitioner's argument are both theoretical and insubstantial.

We submit that the Writ should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1984

CAROL DUNCAN, d/b/a TV NEWS CLIPS,

Petitioner,

vs.

PACIFIC AND SOUTHERN COMPANY, INC., d/b/a WXIA-TV,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a television station's copyright protection relating to its television newscasts is sufficiently broad to prohibit the service provided to the public by broadcast monitors.

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STATUTE

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BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

This amicus brief is filed with the consent of both parties, as set forth in separate letters from respective counsel separately filed with the Clerk's office.

The International Association of Broadcast Monitors ("IABM") is an association composed of over thirty-five broadcast monitors located throughout the United States, Canada, and Europe. The purpose of IABM is to consider and deal with "common problems involved in the monitoring of radio and television transmissions for interested persons in furtherance of their rights of access to materials pertaining to their activities or affairs . . . and to secure cooperative action in advancing common purposes" of its members.

IABM is engaged in a number of activities to promote the mutual interest of its members. For example, IABM regularly publishes a newsletter to its members discussing monitoring practices that have proven effective or opportunities that may exist for its members. IABM also sponsors an annual convention to discuss the many evolving issues relating to the new industry. In addition, IABM has promulgated a Code of Ethics setting forth, among other regulations, strict record-keeping and labelling requirements for all videoclips prepared by a broadcast monitor.

The decision of the Eleventh Circuit will have a profound effect upon the broadcast monitoring industry. The industry, which is still very much in its infancy, performs

a variety of useful services for its clients. Amicus believes that this case raises significant public issues warranting the Court's plenary review. Given IABM's familiarity with the industry, this amicus brief is intended to provide relevant information that will be useful to the Court in its consideration of the petition for certiorari.

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SUMMARY OF ARGUMENT

The decision of the Eleventh Circuit involves a timely issue of public significance impacting many interests in addition to the private interests of the parties to the litigation. The conceptual difficulties involved in applying copyright law, and more specifically the fair use doctrine, in the context of the evolving electronic media and other technologically advanced communication enterprises is well-focused in this case.

The fair use doctrine is structurally the most significant principle regulating the complex interaction between copyright and First Amendment values. The Eleventh Circuit decision improperly ascribed controlling weight to the commercial nature of the petitioner's use. This emphasis is inconsistent with other Courts of Appeals, most notably the Second Circuit, that have focused on other factors.

To analyze the fair use issue involved in this case, the courts must assess the ultimate use by the clients and consumers who utilize the services of the broadcast monitors. If this proper orientation is recognized, the strong public interests in access and fairness overwhelmingly

support the application of the fair use doctrine in this case.

The recent advent of the commercial free speech doctrine provides additional authority for the proposition that the commercial nature of the use *per se* should not be of controlling significance in a fair use analysis. To resolve the fair use question properly, courts must focus on the totality of the use including benefits received by members of the public who purchase the services of the broadcast monitor.

Not only will the specific issue concerning broadcast monitoring result in additional litigation,[1] but the development of high technology communication devices and the incredible growth in and need for information retrieval systems assure similar conflicts of equally serious dimension. A proper exposition of the purpose and application of the fair use doctrine, specifically the relative significance of the commercial nature of the use vis-a-vis other interests, will serve an important function in providing guidance to the courts and the many entities involved with similar issues.

Given the significance of the issues raised, and the public importance of the debate, amicus respectfully request that the Court grant the petition for certiorari.

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[1]Another action raising similar issues is now pending in the United States District Court for the Southern District of Texas. *See Community Television Foundation of South Florida, Inc., d/b/a WPBT-TV, Channel 2 v. Jack Cato and Shirley Cato, d/b/a Broadcast News Report,* Civil Action No. H-83-5742. Additional litigation is likely. The Eleventh Circuit's decision has already received substantial publicity in the trade press for the broadcast industry, including suggestions as to how to draft cease and desist letters to broadcast monitors.

ARGUMENT

While petitioner has provided a complete description of the relevant facts relating to the suit, as well as a useful overview of the broadcast monitoring industry, additional detail relating to that industry will benefit the Court in its analysis of the petition.

The services provided by petitioner are typical of the services provided by broadcast monitors elsewhere.[2] Thus, as a regular part of their business, most broadcast monitors record television newscasts or news-related documentaries, and then to sell relevant portions of these programs, known as videoclips, to interested members of the public.

As one advertising brochure for an IABM member succinctly states, "a broadcast monitor provides an electronic clipping service of the broadcast media for those public relations professionals, corporations and individuals needing a record of what's being said about them and when, where, and how it's being said." The broadcast monitor is the only effective means of providing access

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[2]An excellent example of the industries' present capabilities is provided by the business activities of Video Monitoring Services, a company affiliated with Burrelle's Information Services, a member of IABM. Burrelle's is the world's largest clipping service, and is also involved in computerized advertising analysis, electronic data base searching, and publishing a variety of informational directories. It provides monitoring services from facilities located in New York, Los Angeles, Chicago, and San Francisco, from which Video Monitoring Services monitors local news programming in over 40 major American cities, and also covers national newscasts. Burrelle's and its affiliated companies including V.M.S. employ over 900 individuals.

to the media, and thereafter preserving information for analysis, research, or personal use.

The sale of single videoclips to individuals was the focus of the Eleventh Circuit decision; it is, however, hardly the only function performed by broadcast monitors. All broadcast monitors have a large number of ongoing clients who employ them to monitor local news reports for stories involving that client or events of importance to that client.

The monitors can also independently provide an overview of media coverage including analysis of the overall effect of news reports. For example, one IABM member, Caisse, Chartier et Associates, Inc., a Canadian broadcast monitor, regularly analyzes print and broadcast media coverage and objectively provides an impact analysis of the coverage concerning an upcoming election or of a corporation's public image. This information can then be used by the client to direct or re-direct public opinion. These services, like the basic monitoring function itself, are of substantial benefit to the general public.

By providing access to small portions of news broadcasts placed on the public airways, a monitoring service provides the capacity to gather and assemble such information into a usable form for the person interested in the newscast, as well as an ability to analyze the reports for marketing or related purposes.

These services are important since no other entity is in a position to perform that function. Television stations themselves do not regularly maintain complete copies of news broadcasts; most do not archive a permanent record of news reports for public scrutiny or access. Rather, like

the respondent in this case, the usual practice is to erase the videotapes of the news broadcasts within approximately one week. Of course, one television station could not perform the monitoring function in any event since it could not tape the news reports of its many competitors.

Also, most stations, like WXIA in the present case, do not have the capability or interest to prepare and sell videoclips. Indeed, as recognized by the District Court, there is an inherent conflict of interest in providing such a service. If the station were more interested in selling videoclips than reporting the news objectively, the entire editorial approach to newscasting would be warped. Moreover, stations have a clear interest in erasing news reports in order to limit access to the reports by potential plaintiffs in defamation actions.

While the clients themselves theoretically could monitor all the news broadcasts, only the largest corporations could afford the considerable investment in monitoring equipment and personnel to do so. Moreover, clients seldom have advanced knowledge of news coverage, and given small publicity staffs and inadequate technical capabilities to monitor all relevant news sources simultaneously, it is impossible for the clients to provide comprehensive coverage. Accordingly, the broadcast monitor is the only entity with the capability or interest in providing the valuable services it renders.

The broadcast monitoring industry is a new one. Broadcast monitors are increasingly performing a number of important services for the public, and this evolution will surely continue unless restrictive judicial deci-

sions undercut the progress. Monitoring can be used for a variety of public relations purposes including archiving, researching trends, or collecting educational resource material. The range of services matches the range of public interests that are threatened by the possible curtail of services that may result if the Eleventh Circuit decision is not reviewed by this Court.

The following services are presently being offered by members of IABM:

Review Of Media Coverage For Political Candidates

Broadcast monitors can review and analyze comments relating to political candidates to permit the candidate to assess media coverage or conduct voter awareness surveys. Monitoring services can also assist candidates in identifying important issues, preparing their political platforms, or responding to any perceived "image" problems revealed by the monitoring.

Assembling Material For Use By Attorneys In Civil And Criminal Proceedings

Attorneys regularly have the need for access to information conveyed over television newscasts to assist in effective representation of their clients. An attorney attempting to show bias can use videoclips of relevant portions of newscasts or summaries of news reports provided by broadcast monitors evidencing community sentiment or prejudice. Attorneys have regularly used broadcast monitors in connection with the preparation of motions for change of venue in criminal cases. In another

example, Mrs. Duncan herself provided monitoring services to the attorneys for Wayne Williams, the defendant in the famous Atlanta child murder cases, before formal charges were filed against Mr. Williams in an effort to limit harassment by news reporters. Broadcast monitors have also been used to insure that television stations actually issue retractions when factual errors have been made.

Attorneys also seek access to local news broadcasts for material providing direct evidence relating to issues raised in litigation, such as interviews with significant witnesses, or clips showing significant factual events such as fires at establishments that are then submitted to insurance companies in connection with claims procedures.

Marketing Or Public Relations Surveys

Corporations regularly use broadcast monitors to collect news stories about them. These reports are useful to their marketing departments to ascertain public sentiment about the corporation. As noted above, IABM members use their capability to prepare marketing analyses for use by corporate clients. This capability is one that promises to become an even more significant part of the broadcast monitor's array of services in the future. The list of corporations that now use broadcast monitors would exceed several pages, and would run the gamut from industry giants such as AT&T, Texaco, and Sears to smaller concerns such as Kroger Food Stores, United Way, and an almost infinite variety of local and regional companies.

In addition to corporations, clients who regularly utilize broadcast monitors to assist in marketing or public relations include important participants in public life such

as symphonies, opera houses, hospitals, historical foundations, universities, charitable organizations, and similar organizations who are concerned with public opinion, and who are interested in assuring that the media's reports are accurate and, hopefully, favorable.[3]

Inexplicably, the Eleventh Circuit stated that the petitioner's use was *not* creative or productive. *Pacific and Southern Co. v. Duncan,* 744 F.2d 1490, 1496 (11th Cir. 1984). This observation completely ignores the broadcast monitors' function. As noted above, no one but the broadcast monitor can supply the equipment or personnel to perform the variety of comprehensive services required to monitor all news reports. Thus, the broadcast monitors' services are clearly productive, *i.e.* they perform a service that cannot be provided without their knowledge and industry. Moreover, many of the services rendered by broadcast monitors clearly are creative. Thus, to the extent that the monitor is correlating news reports from different stations or analyzing the contents of reports, as is often the case, the service being provided is creative.

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[3]Evidence presented in *Community Television Foundation of South Florida, Inc., d/b/a WPBT-TV Channel 2 v. Jack Cato and Shirley Cato, d/b/a Broadcast News Reports,* Civil Action No. H-83-5742 (U.S.D.C., S.D. Tex.), provides several examples. The Houston Grand Opera, for instance, uses the services of a broadcast monitor, having found that it was essential that it review all television reports concerning its programs and operations: (1) in order to evaluate its marketing and publicity campaigns; (2) to be informed of the identity of members of the media with whom it should deal; (3) to review clips as a reference point for future publicity efforts; and (4) for archiving purposes since it is impossible for its limited staff to do so itself.

The Eleventh Circuit's skewed orientation colors its entire opinion.

For the reasons that follow, amicus believes that this Court should grant certiorari.

1. The Eleventh Circuit's limited focus and emphasis on the commercial nature of petitioner's use is in conflict with decisions from other Courts of Appeals.

The fair use defense is intended to "balance the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his work." *Warner Brothers, Inc. v. American Broadcasting Companies,* 720 F.2d 231, 242 (2d Cir. 1983). The fair use doctrine is an important means of resolving the conflicts that arise between First Amendment and copyright law. *See Wainwright Securities, Inc. v. Wall Street Transcript Corp.,* 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied,* 434 U.S. 1014 (1978).

In this case, the Eleventh Circuit found that the commercial nature of the use prohibited the application of the fair use doctrine. While a number of separate points were raised by the Court, all of the discussion supporting the inapplicability of the doctrine related to the commercial nature of petitioner's use. This holding is significant, since many of the legal disagreements raising fair use issues involve commercial uses.

While the Court noted that all four factors set forth in 17 U.S.C. § 107, the recently-enacted statute codifying the fair use doctrine, were applicable to its analysis, the Court held that the commercial "purpose and character" of the use "heavily influence[d]" its determination. *Pacific and Southern Co. v. Duncan,* 744 F.2d 1490, 1496 (11th Cir. 1984). The Court went on to characterize petition-

er's use as "unabashedly commercial." Moreover, it expressly rejected petitioner's focus on the public purposes served by its operations by noting that the "fact that [petitioner] focuses on the giving rather than the taking cannot hide the fact that profit is its primary motive for making the exchange."

By considering only the commercial nature of petitioner's use, the Eleventh Circuit has seriously eroded the vitality of the fair use doctrine. Broadcast monitors provide a host of beneficial services to members of the public having a legitimate interest in news reports relating to them. The Eleventh Circuit's focus was unduly limited in that it totally ignored the substantial needs and interests of the clientele served by broadcast monitors. The Court incorrectly assumed that the only type of business activity conducted by monitors was the solicitation of previously unknown consumers. As set forth above, this notion is fundamentally incorrect, as all monitors have a significant number of on-going clients for which they perform monitoring services.

The Eleventh Circuit's decision should be contrasted with the Second Circuit's approach to fair use cases. In *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 105 S.Ct. 100 (1984), the Second Circuit considered whether the fair use doctrine protected a company's advertisement quoting a Consumers Union report on vacuum cleaners despite the fact that Consumers Union did not permit its reports to be used in this manner in order to assure its independence and credibility among its readers. In its argument, Consumers Union stressed the commercial nature of the advertising use by the defendant. The Second

Circuit *rejected* this emphasis on the commercial function and instead noted that "[a]lthough the purpose of [the company's] use undoubtedly is commercial, *this fact alone does not defeat a fair use defense.*" *Consumers Union*, 724 F.2d at 1049 (emphasis added). Regardless of the defendant's motive, *the character* of the use was to convey useful information to consumers of the type protected by the First Amendment. *Id.* (*citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). By focusing on the *ultimate* use by the consumers, the Second Circuit disregarded or overlooked the commercial nature of the use by the company. Instead, it recognized and gave substantial weight to the public's First Amendment interest. *Cf. Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 208 (2d Cir. 1983) ("the fact that profit was involved is, without more, legally irrelevant where the work in which the use appears offers some benefit to the public"), *cert. granted*, 52 U.S.L.W. 3860 (1984).

The Eleventh Circuit decision in this case is in direct conflict with the Second Circuit's decision in *Consumers Union*. Rather than focusing on the *customers'* legitimate interests, the Eleventh Circuit focused solely on the commercial nature of the broadcast monitor's use. In contrast, the Second Circuit looked past the "unabashedly commercial" nature of the use to analyze the overall interests of the ultimate consumers, *i.e.* the general public.

Nor is *Consumers Union* distinguishable on other grounds. The small portions of newscasts used by a broadcast monitor do not represent a more significant use of a copyrighted work than using Consumers Union's test reports for advertising vacuum cleaners. Indeed, the pub-

lic interest of the ultimate consumers to be aware of the exact contents of news reports about them constitutes a more substantial First Amendment interest than the commercial free speech interest involved in *Consumers Union.*

It is also important to recognize the nature of the copyrighted work—a concern ignored by the Eleventh Circuit. Numerous courts have recognized that news reports or largely factual and historical material are entitled to *less* copyright protection than more creative enterprises. *See, e.g., Miller v. Universal City Studios, Inc.,* 650 F.2d 1365 (5th Cir. 1981); *Hoehling v. Universal Studios, Inc.,* 618 F.2d 972 (2d Cir. 1980), *cert. denied,* 449 U.S. 841 (1980). *See generally National Business Lists, Inc. v. Dun & Bradstreet, Inc.,* 552 F.Supp. 89, 96 (N.D. Ill. 1982) ("fair use of research is broad, the fair use of compilation information is narrower, but certainly greater than the permissible fair use of more creative products"). Thus, where the nature of the work is informational rather than creative, the scope of permissible fair use is greater. *See Rosemont Enterprises, Inc. v. Random House, Inc.,* 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967). The public interest in dissemination of information is entitled to substantially greater weight than afforded to it by the Eleventh Circuit.

The advent of the commercial free speech doctrine provides additional authority for the proposition that the commercial nature of the use *per se* should not be of controlling significance in fair use analysis. For example, in *Bates v. Arizona State Bar,* 433 U.S. 350 (1977), this Court went beyond the fact that the attorney conducting the advertising had a clear, indeed even "unabashed," com-

mercial interest in placing the advertisement. Rather, the Court analyzed the interest of the ultimate consumer in receiving the material to determine the First Amendment interests at stake. The Eleventh Circuit failed to conduct the same type of analysis. The First Amendment interest in this case cannot be dependent solely upon the existence of a non-commercial motive. Rather, a proper constitutional analysis involves consideration of the overall function and character of the activity.

2. The Eleventh Circuit's reliance on an unproven and, in any event insignificant, "potential" market is in conflict with the other Courts of Appeals' emphasis on direct competition for purposes of fair use analysis.

The Courts of Appeals have recognized that the single most important factor in analyzing a fair use issue is the *actual effect on direct competition* between the copyright owner and the user. *Consumers Union,* 724 F.2d at 1050. *See Iowa State University Research Foundation, Inc. v. American Broadcasting Companies,* 621 F.2d 57 (2d Cir. 1980) (where scope of the defendant's use is the same as the copyright owner's use, fair use doctrine should be narrowly applied).

In contrast to the above approach, the Eleventh Circuit embarked on a potential market analysis without support in prior copyright case law. By focusing on a *potential* market analysis of non-existent economic reality to the respondent, the Eleventh Circuit created new, and potentially dangerous precedent that will limit creative efforts by others.

The record established that the petitioner did not compete with the respondent in the news reporting business.

Rather, petitioner served a limited secondary market essentially of her own making. Respondent did not provide monitoring services and had no plans to do so. Moreover, as previously explained, a single television station could not provide monitoring services even if it were interested in selling videoclips of its own news programs since it could not provide comprehensive monitoring of other station's broadcasts.

It is thus undisputed that petitioner does not directly compete with respondent in the news reporting business. Nonetheless, the Eleventh Circuit held that the petitioner's use adversely impacted the copyright owner's interests by focusing upon the existence of an unproven, and indeed hypothetical, *potential* market. This analysis apparently confuses a doctrine borrowed from trademark infringement cases or perhaps antitrust law, although the Court cited no authority whatsoever.

In contrast, other Courts of Appeal have focused upon the *actual* market for the copyrighted work, and have ignored insignificant or non-existent potential uses altogether. In *Consumers Union,* for example, the Second Circuit noted that some consumers might purchase back issues of the Consumer Reports magazine containing the vacuum cleaner report if the advertisement was enjoined. Nonetheless, the Court rejected this potential adverse effect on Consumers Union as being too insignificant to constitute the type of effect on direct competition that would be relevant for fair use purposes. *Consumers Union,* 724 F.2d at 1051 (fair use analysis depends on effect of the use on the "demand for the original work"). *Cf. Wain-*

wright Securities Inc. v. Wall Street Transcript Corporation, 558 F.2d 91, 96 (2d Cir. 1977) (rejecting fair use defense where "obvious intent, if not the effect," of the use was to fulfill "the demand for the original work"); *Rubin v. Boston Magazine Co.,* 645 F.2d 80, 84 (1st Cir. 1981) (noting that plaintiff was injured by defendant's use as shown by actual discussions concerning sale to other user). Other courts have similarly observed that a use by a non-competitor is more likely to qualify as a fair use since it is unlikely to cause any injury to the market for the copyrighted materials. *See The New York Times Co. v. Roxbury Data Interface, Inc.,* 434 F. Supp. 217, 223 (D.N.J. 1977).

3. The Eleventh Circuit's decision conflicts with Sony and the First Amendment in that it effectively denies the right of members of the public to obtain tapes directly relating to them.

The potential applicability of the fair use doctrine in recording news broadcasts was expressly recognized by the Supreme Court in *Sony Corporation of America, Inc. v. Universal City Studios, Inc.,* 104 S.Ct. 774, 813 n. 40 (1984). There, the Court noted that all copyrights were not fungible, but that some related to material with broad secondary markets with significant economic value. The Court noted that such material is entitled to broad protection because of the "greater potential for commercial harm. *Copying a news broadcast may have a stronger claim to fair use than copying a motion picture." Id.* (emphasis added).

The logic of the Court's observation is inescapable. There is no tremendous artistry or significant commercial potential in direct subsequent uses of single portions of news broadcasts. To be sure, broadcasters may add a

measure of originality in the editing process. The law properly permits a fair measure of copyright protection to prevent other news reporting competitors from usurping the copyright owner's product. There is no reason to provide significant additional protection vis-a-vis non-competitors.

The Eleventh Circuit's decision below is inconsistent with *Sony*. In *Sony*, this Court determined that individual citizens had the right under the fair use doctrine to tape all types of programming material for home use. Under *Sony*, there is no doubt that individuals, corporations, or other entities could themselves tape portions of newscasts about themselves for the many purposes outlined above.[4]

Without doubt, *Sony* would protect the right of individual members of the public to tape news and related television programming, and thereafter use the tapes for performing the same type of analysis and services now being conducted by broadcast monitors. This process would be nothing more than the routine librarying now authorized under *Sony*.

Given the practical impossibility of individuals or single corporations investing in monitoring equipment and

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[4]Indeed, individuals would probably have the right to tape newscasts about themselves even if the dissenting viewpoint in *Sony* had prevailed. *Sony* primarily concerned entertainment programming such as movies, etc., where the consumer had no personal interest. In the present case, the consumers have a clear interest in the news being reported about them. Indeed, their claim to the story is probably stronger than that of the news station.

personnel, these clients simply have broadcast monitors perform the taping and monitoring function on their behalf. This process should be protected under *Sony*. In practical terms, it is absurd to argue that the fair use doctrine permits individuals and corporations to do the taping, but denies that right to a broadcast monitor doing the same function on behalf of the client.

CONCLUSION

The Eleventh Circuit decision significantly bolsters the monopoly power of the copyright owner in an inappropriate context. The decision fails to articulate the significant differences between copyright protection as between users who are competitors and those who are not. Moreover, the unprecedented protection is provided in the context of news reporting that should be subject to lesser protection for the copyright owner, not more. The Eleventh Circuit's decision did not analyze the important public interest in access to television news reports. There are many members of the public, including corporations, politicians, attorneys, and individuals who are legitimately interested in what the press is reporting about them. For these individuals and entities, the services provided by broadcast monitors are the only means of obtaining meaningful access.

For the foregoing reasons, Amicus respectfully urges the Court to grant the petition for certiorari.

Respectfully submitted,

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